

Evidentiary Hearing

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

File No. 12-20607

ROBERT J. POCHMARA, MAXINE C. POCHMARA,
GARY L. WILSON and SUE A. WILSON,

Defendants.

EVIDENTIARY HEARING

BEFORE THE HONORABLE THOMAS L. LUDINGTON

United States District Judge

United States Post Office Building

1000 Washington Avenue

Bay City, Michigan 48708

Monday, December 9, 2013

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Evidentiary Hearing

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1 Bay City, Michigan

2 Monday, December 9, 2013

3 At 9:47 a.m.

4 (Court, counsel and parties present)

5 THE LAW CLERK: Calling the case of United States versus
6 Gary Wilson, Sue Wilson, Robert Pochmara and Maxine Pochmara,
7 Case No. 12-20607.

8 THE COURT: Good morning. If we could have counsels'
9 introductions, please.

10 MS. PARKER: Good morning, your Honor. Janet Parker for
11 the United States. With me is Jeff Hackett, the Railroad
12 Retirement Board Special Agent.

13 THE COURT: Good morning.

14 MR. JACOBS: Good morning, your Honor. Steve Jacobs on
15 behalf of Gary Wilson who is also present, your Honor.

16 THE COURT: Good morning.

17 MR. PIAZZA: James Piazza on behalf of Sue Wilson who is
18 present in the first row. And question, does the Court wish us
19 to rearrange the furniture around here or is that sufficient for
20 the clients remaining where they are?

21 THE COURT: That's -- that's sufficient. If you don't
22 mind leaving the furniture where it is, we'd appreciate it.

23 MR. KOELZER: Good morning, your Honor. David Koelzer
24 from the Federal Defender Office on behalf of Defendant 1, Robert
25 Pochmara, who is seated behind me.

1 THE COURT: Good morning.

2 MR. RUPP: Good morning, your Honor. Jeffrey Rupp on
3 behalf of Maxine Pochmara who is also present.

4 THE COURT: And good morning. We were -- when the cases
5 were originally assigned for sentencing dates the last time, we
6 ended up with a fair number of objections that were made to the
7 original pre-sentence report that needed additional attention.

8 After meeting with counsel, we entered an order on
9 October the 10th, requesting supplemental briefing on a number of
10 issues. According to my review at this stage, we had a number of
11 issues that were in common among the defendants that needed
12 resolution.

13 There were differences of opinion concerning scoring
14 with respect to guidelines on the role in the offense. We had at
15 least a recommendation of two of the defendants by the probation
16 officer to receive enhancements for being organizers, leaders or
17 managers, as well as some suggestions by the government that more
18 than one party should receive that two-level enhancement.

19 In addition, the Wilsons in particular sought reductions
20 as a result of their having minor roles with respect to the fraud
21 that was involved in the case.

22 In addition to role of the offense, we had an additional
23 common question concerning a two-level increase for Mr. and Mrs.
24 Pochmara as a result of their marital activities, or lack
25 thereof.

1 A third issue concerning Mr. Wilson's objection to the
2 two-point enhancement for obstruction of justice based on the two
3 witnesses that we heard during the course of the trial and their
4 suggestion that he sought to intimidate them concerning the
5 testimony that they were to provide.

6 The fourth issue was the amount of loss and that was in
7 part at least at the time encompassed by a question on the
8 appropriate assessment of the Social Security that Maxine
9 Pochmara would have received in lieu of that being paid
10 appropriately with respect to Robert.

11 And a remaining question concerning the adequacy of the
12 financial disclosures.

13 My intent at this point would be to take up those five
14 issues while we are in common session, resolve each one of those.
15 There may be times where we may need some argument by counsel.
16 Counsel may consider it appropriate with respect to any one of
17 those issues, to offer additional testimony.

18 Once we have resolved the guideline questions, those in
19 particular, we'll take a break and then return at that point for
20 individual sentencing hearings with respect to each of the four
21 folks that are calendared for sentencing today.

22 Any objection to the procedure by the government?

23 MS. PARKER: No, your Honor. Thank you for the
24 clarification.

25 THE COURT: Defense counsel comfortable with the

1 approach?

2 MR. JACOBS: Yes, sir.

3 MR. PIAZZA: No objection, your Honor.

4 MR. KOELZER: No objection.

5 THE COURT: All right.

6 MR. RUPP: No objection.

7 THE COURT: Let's begin with the role in the offense.

8 As indicated in our earlier opinion, it's a bit of a difficult
9 set of circumstances for us. We had -- we've received two guilty
10 pleas from two of the defendants, Mr. and Mrs. Pochmara. Mr.
11 Pochmara's explanation of the events was somewhat limited in his
12 explanation to he and Maxine's involvement in the -- in the
13 fraud.

14 His testimony did not extend to the Wilsons'
15 involvement. The Wilsons, on the other hand, have maintained
16 their innocence but not to the extent that a jury found that
17 sound.

18 The question then becomes who were the primary leaders
19 and organizers, who were the primary followers. The evidence
20 from the Court's point of view has been fairly clear that the --
21 they were all quite aware of the fraud that was being perpetrated
22 on the railroad pension fund. It was the only way in which it
23 could be implemented.

24 The fraud was, frankly, breathtaking and clear in its
25 simplicity. All that was done was to, as much as possible, hide

1 Robert's receipt of the pension under circumstances where he
2 recognized it needed to be reported. And everyone at one level
3 or another participated in trying to maintain that information
4 and maintain it privately, without the pension board knowing it.

5 And it was remarkable. I mean, even before trial when I
6 looked at the exhibits that were going to be offered, including
7 even Susan Wilson's explanation to the pension board, that -- and
8 I'm quoting from the December 10, 2008 document that she
9 furnished to the pension board:

10 "Robert has never/does not, draw earnings from
11 NAPA W.W. Auto Parts. Only Maxine Pochmara does.
12 Robert works on behalf of Maxine."

13 Incredibly simple in its explanation and so inherently
14 wrong on its face.

15 So what do we have at this stage to make a determination
16 about who was responsible for the fraud, who was an organizer or
17 leader. The Wilsons have not furnished any particular
18 explanation. They have maintained their innocence and gone to
19 trial. Mr. Pochmara says only he and his wife knew. Maxine says
20 everybody did. And the circumstantial evidence suggests
21 everybody did.

22 What does the government think that we should do here?
23 Who do you believe should receive increases in the level for
24 their participation and who do you think, if any, are entitled to
25 reductions as a result of only playing a minor role?

1 MS. PARKER: Your Honor, I would submit that no one is
2 entitled to a reduction for a minor role. As the Court has
3 already indicated, all participated in various ways that were
4 critical to the scheme to make it succeed at various times. To
5 me, there is just really no basis whatsoever for saying anyone
6 was a minor participant.

7 As far as who should get a role enhancement, I think
8 that one could argue that at different points in time, different
9 people took a leadership role. But I think as an initiation of
10 the scheme, based on what we have of record, and the defendants
11 have been offered an opportunity to provide something to the
12 contrary and have not done so, what the record reveals between,
13 as the probation officer pointed out, the transcripts from the
14 Pochmaras' pleas and Mrs. Pochmara's concession that she could
15 have been the person who came up with this idea, I would think
16 that, frankly, she is the leading candidate for the greatest role
17 increase.

18 I don't see that the Wilsons would have had a reason for
19 coming up with this scheme. I think they might have said, we
20 need an employee, do you want to come and work for us, Mr.
21 Pochmara. You know, you're not doing, you know, other employment
22 at this time, would you be willing to do this.

23 That wouldn't have necessarily been an overture based on
24 their knowledge of what became the critical facts in the scheme,
25 that is that Mr. Pochmara was collecting disability and if he

1 worked under his own name and Social Security number, that would
2 potentially impact that, either reduce or eliminate those sort of
3 benefits.

4 So I would think that at the outset, logic at least
5 suggests that the Wilsons were not the originators of the scheme.
6 You have Mr. Pochmara's statements under oath. You have Maxine
7 Pochmara's statements under oath suggesting that there was
8 participation by her with the Wilsons which is not acknowledged
9 as has been pointed out by Mr. Pochmara.

10 Plus she also stood the most to gain. If you think
11 about it, not only was she in the position of sharing the
12 proceeds from the scheme in terms of the Railroad Retirement
13 Board benefits, compounding what was being brought in through her
14 legitimate employment and then the illegitimate employment by Mr.
15 Robert Pochmara, you also had the enhancement to her own Social
16 Security account. So she had the most to gain and she's
17 acknowledged both under oath that she dealt with the Wilsons in
18 the origination of the scheme and her statement within her
19 response to the Court's order that she could have been the
20 person.

21 And I think, frankly, collectively, all of this
22 information certainly in the absence of any information to the
23 contrary, would indicate that she was the person who basically
24 hatched this scheme and would entitle her to the greatest role
25 enhancement.

1 At the same time, as I argued in my responses, other
2 people at various times and in various ways played a controlling
3 role. And oh, by the way, Maxine stood to gain the greatest
4 financially, because not only was she getting the enhancement to
5 her own household income as was Mr. Pochmara, but she was also
6 gaining in her own Social Security account which is another
7 factor that the Court can consider in determining the magnitude
8 of the role enhancements.

9 But moving on to the other thing, Mr. Wilson, at any
10 time, could have brought the scheme to an end. All he had to do
11 was stop paying Robert Pochmara. Same thing for Sue Wilson. All
12 they had to do was refuse to pay Robert Pochmara by making checks
13 out to Maxine. Simply make them out to Robert, do the tax and
14 Social Security reporting using his Social Security number. It
15 probably would have brought this scheme to an end and certainly,
16 at that point, would have taken themselves out of involvement in
17 the conspiracy.

18 At the same time, Robert Pochmara was the person who had
19 a role in it because he could have said, I'm not going to do
20 this. I'm either not able to work or I realize this is
21 fraudulent. I'm not going to do it and, of course, if he had
22 withdrawn his services from the conspiracy, there would have been
23 no basis for the operation of the conspiracy.

24 So I think in different ways, all provided a critical
25 role and as the Court has pointed out, when we get to the, sort

1 of the denouement of the conspiracy when things are coming
2 towards a conclusion, Sue Wilson comes forward and does what she
3 can in terms of her communication with the Railroad Retirement
4 Board, basically trying, again, against all obvious truths, to
5 mischaracterize what is going on, what is being done, to try to
6 legitimize it so the plan can continue. She obviously didn't
7 see any point in trying to discontinue the arrangement that had
8 been going on successfully for more than a decade, eleven-plus
9 years. So --

10 THE COURT: And -- and when I initially read that -- and
11 I don't have the benefit of understanding at this point of what
12 the Wilsons' point of view was -- it was somewhat surprising to
13 me, because it was either incredibly naive in suggesting that any
14 one individual can shift the reporting of earned income based on
15 labor to another taxpayer. So it either fell into the category
16 of incredibly naive on the one hand, incredibly naive mistake, or
17 an attempt to bamboozle -- one more attempt to bamboozle.

18 MS. PARKER: Your Honor, I think it falls in that latter
19 category because you have to look at it in the context of all the
20 other things that she signed. Whenever she did a report where
21 she gave the names and Social Security numbers of the officers,
22 she omitted Robert Pochmara and put in Maxine Pochmara. When
23 they did tax returns, it was the same thing. They didn't do W-2s
24 for him.

25 I mean, time and time again -- they had other employees.

1 They never did this with any other employees. They never said,
2 you know, Joe Bitzfick, you can work under the name of Marlene
3 Bitzfick. Marlene Bitzfick would like to put a little more money
4 into her Social Security account. That's fine. We're okay with
5 that. They never did that for any other employees. It was only
6 this group of four that they engaged in this type of conduct.

7 They knew how to do it right. They did it right with
8 regards to these other employees where they didn't have this
9 special relationship. But I think that is what gives definition
10 and resolves the potential ambiguity in the statement that the
11 Court is discussing.

12 Every time -- and they've -- even today, they say, oh,
13 she did this report, it's got Pochmara's name -- Robert
14 Pochmara's name on it. There is no Social Security number on it.
15 They never ever, when those two things are together, name and the
16 Social Security number, does she or Mr. Wilson provide that in an
17 official record.

18 THE COURT: Now, I will indicate that I have fairly
19 carefully read all of the supplementary papers so my point here
20 is not necessarily to repeat but I would like highlights from
21 counsel with respect to their remarks with respect to their
22 individual clients.

23 Mr. Jacobs, do you want to lead first with respect to
24 Mr. Wilson?

25 MR. JACOBS: Yes, your Honor.

1 Your Honor, in that supplemental brief, I did inform the
2 Court that I would be presenting live testimony through Mr.
3 Kieliszewski, the accountant. His testimony would be regarding
4 whether my client received a financial benefit which was referred
5 to in Miss Parker's brief and we assert they did not and they
6 were a certain C-type corporation. And Mr. Kieliszewski would
7 also testify regarding the financial disclosure and information
8 in the pre-sentence report.

9 I don't know if I need to put him on at this point in
10 time but I will when that becomes an issue need to put him on.

11 THE COURT: We will get there.

12 MR. JACOBS: First in regards to Gary Wilson could have
13 stopped at any time and again, any paper --

14 THE COURT: Now, may I understand that at this stage,
15 your client maintains his innocence and does not intend to take
16 the stand with respect to the sentencing variable?

17 MR. JACOBS: That's correct, your Honor. He does intend
18 to take the stand in regards to the enhancement, the alleged
19 enhancement of intimidating the witnesses.

20 THE COURT: Yes, sir.

21 MR. JACOBS: And to a small extent, I will ask him about
22 my proposed exhibits that we submitted with the Court regarding
23 the financial disclosure of assets. But as to -- it would just
24 be as to those two categories.

25 THE COURT: We will limit our remarks at this point to

1 the role of the offense variable.

2 MR. JACOBS: I would assert in a paper crime type of
3 conspiracy, almost any one of the co-conspirators could stop the
4 conspiracy from occurring at any time by just failing to submit a
5 document or not submit a document for which is fraudulent or not
6 fraudulent and to -- this is what gets awfully frustrating in
7 this case. We hear from the government that my client is somehow
8 sophisticated and -- and that in all the documents that were
9 filed with the government agency, we failed to list Robert
10 Pochmara's name.

11 And then when we present a document, our Exhibit 1 that
12 was filed with the government, the Department of Labor and
13 Economic Growth, listing Robert Pochmara as a vice president of
14 the corporation, and this is in August of 2004, and then in a
15 later document saying same as before in May of 2006, now we get a
16 different argument from the government.

17 Well, okay, now you showed us that you did in fact list
18 his name in certain filings with the government but you didn't
19 list his Social Security number. So therefore, you're somehow
20 more sophisticated.

21 I would assert it's the government just going to Plan B
22 and I'm not going to get tracked down that well, for lack of a
23 better way of saying it. I -- I do not hear them asserting that
24 my client needs an increase in the role of the offense, although
25 I do need to respond to Miss Parker saying that no one should get

1 a decrease.

2 My client did not receive a financial benefit. They
3 paid taxes regarding the monies earned and sent those tax monies
4 in, in 940s, 941s, 1028s, Michigan unemployment. There is
5 absolutely no testimony that my client is a leader or organizer.
6 And it's pretty obvious that in not receiving a financial
7 benefit, that he should receive a reduction for his role in the
8 offense.

9 That's all, your Honor.

10 THE COURT: We concede or I acknowledge that neither
11 your client, Mr. Wilson, or Mrs. Wilson, ended up with a nickel
12 in this whole process. All they were involved with was
13 facilitating a scheme that benefited the Pochmaras.

14 The question I've got at this stage as I try to resolve
15 this variable, is that apart from that argument, what other
16 evidence do I have other than the circumstantial evidence and the
17 evidence that the Pochmaras have offered me in conjunction with
18 their guilty pleas.

19 Anything?

20 MR. JACOBS: Nothing, your Honor, and I don't have a
21 duty to present any evidence.

22 THE COURT: I'm not suggesting that you do.

23 MR. JACOBS: What?

24 THE COURT: I'm not suggesting that you do.

25 MR. JACOBS: Oh. We just have the facts and we have

1 application notes that say one of the factors the Court is to
2 consider is whether someone receives a financial benefit and the
3 Court is conceding that my client didn't receive a financial
4 benefit.

5 And I think based on the facts that the Court has, the
6 Court cannot give an enhancement regarding Gary Wilson and can
7 legitimately give a reduction for role in the offense.

8 THE COURT: Very good. Thank you.

9 Good morning, Mr. Piazza.

10 MR. PIAZZA: Good morning, your Honor. I will not be
11 lengthy. Most of my arguments are in my briefs and memorandums
12 and I rely on those. Although a couple issues.

13 One, as I -- also, as Mr. Jacobs indicated, where is the
14 financial benefit? There was none to Sue Wilson. The
15 prosecution says, well, she sent these letters. She sat down
16 with, you know, members of the government and says here are the
17 documents. She wasn't hiding anything. She gave everything to
18 them and then the government turns around and says, well, look
19 it, you know, you're guilty because of these documents that you
20 gave me.

21 THE COURT: Well, recall, that the -- that the jury
22 agreed.

23 MR. PIAZZA: Understand. But we're talking about just
24 the minimal involvement in this particular matter and we are
25 arguing for a four-point reduction for the minimal involvement on

1 behalf of Mrs. Wilson.

2 Prosecution says she is trying to hide things so she
3 must have been more involved than minimal by not giving, you
4 know, Robert Pochmara's name. But in Exhibit 1 attached to my
5 original sentence memorandum, as well as incorporated with Mr.
6 Jacobs, you know, prosecution says, well, she didn't put down a
7 Social Security number.

8 Nowhere in that document that was filed by my client
9 requested the Social Security number of any of the individuals.
10 He was listed in various -- Robert Pochmara was listed in various
11 documents that was submitted to the government, both state and
12 federal.

13 So where is her involvement? How deep is her
14 involvement? I think the Court touched on it, as, you know,
15 extreme naivete. During the trial, people said she was in the
16 office, over a ten-year period, a couple of times. She signed
17 the checks. She submitted, you know, the receipts, you know, to
18 the CPA. And that's all that the testimony was.

19 THE COURT: Recall that the jury concluded --

20 MR. PIAZZA: I understand.

21 THE COURT: -- that it wasn't a problem of limited
22 contact and simple naivete. Their conclusion was different.

23 MR. PIAZZA: We are in a different situation here in
24 asking for a minimal, you know, role.

25 THE COURT: Agreed.

1 MR. PIAZZA: And the Court can take a look at that. I
2 understand the jury verdict. My client still maintains her
3 innocence. But the Court has to make a decision on the role and
4 whether or not there is mitigation. And looking at what was
5 introduced during the trial and the fact of no benefit to my
6 client, the Court can realistically look at minimal involvement.

7 And the fact that we have a high school, you know,
8 graduate who has been on medication, has been sick throughout
9 her life, where is the sophistication for her to come up with
10 this and become, you know, more involved? At best, according to
11 the jury verdict and not conceding that, she was minimally
12 involved.

13 THE COURT: I appreciate your remarks. Good morning,
14 Mr. Koelzer.

15 MR. KOELZER: Good morning, your Honor.

16 The Court says with regard to role, who were the leaders
17 and organizers. I would suggest the answer could be no one. I
18 think the government's approach here has been there are a certain
19 number of points that have to be distributed and where do they
20 fall. There are times where there is no leader.

21 This is -- as co-counsel, Mr. Rupp, pointed out in one
22 of his presentations, there is a chatter, talk, get-together,
23 people come to an agreement, maybe someone suggests it, maybe
24 someone doesn't. This is twelve or more years ago. That doesn't
25 necessarily mean there is a leader or leadership points are

1 appropriate.

2 The other more general point before I get to one
3 specific point is this whole idea of anyone could have brought
4 this scheme to an end by Robert could have said no to this, Sue
5 could have not written the checks, Gary could have said this.
6 The fact that someone could have brought this scheme to an end I
7 don't think furthers the government's effort to meet its burden
8 in any way.

9 It doesn't mean that a person has a leadership role
10 because they had a role in the offense such that if, at some
11 point, that person wanted to withdraw, that person could stop the
12 scheme. I don't think that that -- I don't think it follows as
13 night follows day, that that means there are leadership points
14 there.

15 The more specific point and I keep -- I read first in
16 the Court's order and then I tried to respond and then I heard it
17 again in the government's response, words to the effect of Robert
18 Pochmara was unwilling to involve anyone -- unwilling to testify
19 at his plea hearing as to anyone else's involvement. I think
20 that's a mischaracterization.

21 At the plea, as I said in my brief and I won't belabor
22 it, the point is to make a factual basis. So in order to meet
23 the elements of the offense, a person has to conspire with one
24 other person, certainly not a government agent. There always has
25 to be at least one other conspirator and we established that

1 Robert Pochmara conspired with Maxine Pochmara and didn't need to
2 go further. The government accepted that. The Court accepted
3 that.

4 Now, it's kind of being twisted where I can only
5 speculate that somehow he is trying to protect others or there is
6 some sort of spin on it that I think is far afield from what we
7 actually did which was to make -- as the transcript shows, to
8 make a factual basis out for a guilty plea.

9 So I guess I don't like to see that blow up in his face
10 particularly since it was with my advice that we kept the factual
11 basis simple in order to meet the elements of the offense, accept
12 responsibility, plead guilty.

13 This whole issue of he didn't go far enough into detail
14 about the relative responsibilities of others, I don't think
15 should be held against him in any way. And I certainly don't
16 think that it enhances in any way his role in the offense.

17 So I would suggest -- I understand the Wilsons are
18 arguing minimal role. We haven't presented that argument but I
19 would suggest that flat out zero points here would be appropriate
20 for role in the offense. The fact that my client was involved
21 and admits that he did something wrong and could have done
22 something by withdrawing at some point, I don't think any of
23 those factors lead to proper imposition of any points for the
24 role in the offense.

25 THE COURT: Now, while we have you present because it

1 will have an impact on one of the other variables that I saw in
2 the supplementary papers, the government's computation that the
3 benefit that your client received was not \$325,000. It was
4 \$428,585.

5 How is that possible?

6 MR. KOELZER: Well, I don't know that I can answer that.
7 The government came up with that, I would say at the twelfth
8 hour, not just the eleventh hour. The government's theory
9 appears to be, that he's not really disabled so all the money he
10 made from the beginning was fraudulent. I think it -- I mean, I
11 will get to this when we talk about that issue specifically --
12 but I think it really misses the boat because he may be disabled
13 from the railroad. He had a serious injury. By all accounts,
14 the pre-sentence report confirms that. He can't work for the
15 railroad. That doesn't mean he couldn't theoretically do
16 something less physically taxing.

17 So I don't think it makes any sense to say that the loss
18 amount is over four hundred thousand by virtue of that theory.
19 It's a -- as co-counsel said, it's another Plan B argument. The
20 government -- we start with \$218,000. Then it becomes three
21 twenty-five because it goes farther along in time. Then it
22 becomes four oh two because of some mysterious Social Security.
23 And now it becomes four twenty-eight because it was all
24 fraudulent from the beginning which comes out, you know, in
25 November of 2013.

1 So I would suggest that the loss amount -- and again,
2 I'm getting ahead of myself but that's my answer with respect to
3 that issue.

4 THE COURT: And what I would like to do is clarify my
5 understanding that the beginning point for those calculations was
6 the same. But that the \$325,000 was through 2009 but apparently,
7 he continued to receive the benefit?

8 MS. PARKER: Up until the time of the plea.

9 THE COURT: And so --

10 MS. PARKER: Because there wasn't an official
11 determination, a basis for ceasing the payments until the plea
12 was entered or until there was an adjudication by virtue of a
13 jury verdict, so he continued to collect through that point.

14 MR. KOELZER: That's correct, judge.

15 MS. PARKER: And I think that is the basis. I would
16 submit that would only apply to the Pochmaras and not the Wilsons
17 because the point ceased -- the other figure, the roughly
18 \$325,000 figure, is computed up to the point where they stopped
19 paying him.

20 THE COURT: Where the --

21 MS. PARKER: The NAPA Auto Store ceased paying, I should
22 say, Maxine for Robert's work.

23 THE COURT: All right. Did he continue to receive
24 checks and deposit them even after being indicted?

25 MS. PARKER: Yes.

1 THE COURT: Really.

2 MS. PARKER: Yes.

3 THE COURT: Hmm.

4 MR. KOELZER: That's my understanding as well, your
5 Honor. In fact, it was one of the reasons he had to contribute
6 to his attorney's servicing -- to pay, to reimburse the taxpayers
7 because he still had the income. I can only imagine that until
8 there is an adjudication of improper gain in some way, then the
9 money keeps coming.

10 THE COURT: Yeah, I appreciate the fact that the money
11 keeps coming. But it isn't mandatory that you deposit it.

12 MR. KOELZER: Well --

13 MS. PARKER: I believe it was direct deposited.

14 THE COURT: It was direct deposited.

15 MS. PARKER: But it was also withdrawn, I believe,
16 too --

17 THE COURT: All right. I appreciate your point.

18 MS. PARKER: -- based on the financials.

19 THE COURT: And I thank you, Mr. Koelzer.

20 MR. KOELZER: Yes.

21 THE COURT: Mr. Rupp, from a small town.

22 MR. RUPP: Thank you, your Honor.

23 With regard to Maxine, as I understand it, there is a
24 couple of arguments offered by the government why she should be
25 the most culpable for leadership and before I address that, I

1 would agree with and adopt the comments made by Mr. Koelzer as it
2 relates to Robert Pochmara. I think they are roughly equally
3 applicable to Maxine.

4 One argument is that she stood the most to gain, that it
5 increased her Social Security and that this was something that
6 she was pulling the strings on the puppets of the others involved
7 here to increase her Social Security benefits.

8 Other than the government's imagination, there isn't any
9 evidence offered that that was ever an intent or object of what
10 any of these parties were doing to increase the Social Security
11 benefits that Maxine Pochmara might be entitled to.

12 In my supplemental brief, I acknowledge as the
13 government points out, that given the passage of time, we are not
14 clear who first came up with the idea or exactly how it was
15 hatched. And Maxine acknowledges that maybe it was my idea. But
16 I've also cited case law that says hatching the idea does not
17 equal leadership. The argument also puts forth that any one of
18 the four, in fact all of the four, were leaders at some point
19 because they could have put an end to the conspiracy by deciding
20 not to participate anymore. I think that, without justification,
21 equates participation in a conspiracy to leadership in a
22 conspiracy.

23 In the government's supplemental brief, particularly
24 with regard to Maxine, the argument is presented that we should
25 apply common sense and on that point, I agree with the

1 government. We should apply common sense.

2 As the Court indicated this morning, this scheme came
3 together and was executed with breathtaking simplicity. This is
4 not a group of people or an individual who is commanding anybody
5 else, managing anybody else. Maxine is not pushing buttons so
6 that she can increase her Social Security.

7 The benefit to the Wilsons is that they had a business
8 that was in danger of going under. They needed an influx of
9 capital. Gary Wilson approaches Robert Pochmara for an
10 opportunity to buy into the business. Robert Pochmara doesn't
11 have the bank account or the credit score to do so. Somehow, the
12 idea or the opportunity is passed along to Maxine and she is able
13 to do so, gets a loan, buys into the business, helping out the
14 Wilsons and the NAPA Auto Parts Store.

15 Somewhere along the way, the idea is Robert is at the
16 store all the time, maybe he can do a little bit of work there,
17 pull some income. We don't want to impair his ability to keep
18 collecting the railroad disability payments so we will make the
19 paychecks out to Maxine.

20 I think it's fair to say that all four of the
21 participants here are simple folk and that they are not -- no one
22 of them has the foresight to order around the others in order to
23 increase their Social Security benefits. We have somebody
24 working, we have to write a paycheck. We don't want to write the
25 paycheck to Robert because that will impair his benefits so we

1 will write it to Maxine. It's a paycheck so you pay your taxes
2 on it.

3 There was a tangential effect or ripple effect that,
4 yes, it can, and likely did increase her Social Security benefits
5 if she got to the point of actually collecting them but there is
6 nothing other than speculation or imagination to get to that
7 point from the government.

8 THE COURT: Now, having received, within the family, in
9 excess of \$425,000 under circumstances where the Wilsons did not,
10 your suggestion to me is that we should treat the Wilsons as
11 equally culpable as your client?

12 MR. RUPP: That may be another way of stating it. What
13 I'm saying -- my point is, is that no one person in this is a
14 leader. I'm not saying that it's Maxine or Robert, Gary or Sue.
15 That's not my purpose or that's not the point of my argument that
16 they are all on equal footing. I'm arguing that Maxine is not
17 a leader and furthermore, that not one of these people is a
18 leader.

19 THE COURT: They just kind of fell into half a million
20 bucks.

21 MR. RUPP: Well, that's if you accept the government's
22 calculations. Mr. Koelzer has already addressed or we've already
23 discussed the payments between 2009 when the conspiracy came to
24 an end and the continuation of payments to Robert. But it
25 also -- that \$428,000 figure also includes every payment that

1 Robert ever received from the Railroad Retirement Board from 1991
2 up until 1999, when the conspiracy began. The government's
3 theory being he was at all times able to --

4 THE COURT: Now, just a couple remaining questions that
5 I would appreciate at least your view on. Apparently, I see from
6 the pre-sentence report, that Mrs. Pochmara ended up in trouble
7 with her employer that post-dated the events of the indictment.
8 She apparently had been reporting Robert as her spouse in order
9 to take advantage of a benefit. And ended up having to make
10 adjustments there because that wasn't true either.

11 Should I consider that in trying to evaluate her role in
12 the initial effort to scam the U.S. government as opposed to her
13 employer? Does that have any bearing do you think in resolving
14 that issue?

15 MR. RUPP: I don't believe it does, your Honor.

16 THE COURT: How about withholding the title on the, I
17 guess it was a motorhome, until the son's marital problems were
18 addressed?

19 MR. RUPP: Again, I don't believe it has a bearing on
20 the Court's determination on whether she has a leadership role in
21 this conspiracy.

22 THE COURT: I agree with you. Any concluding remarks
23 from the government?

24 MS. PARKER: Yes, your Honor. I agree with the Court
25 that the issue of who stood to profit the most is not the sole

1 determination or factor used to determine a leadership role. It
2 is a factor but it's not the sole factor.

3 I would challenge Mr. Piazza to find a single document
4 that was submitted by his client to the federal government that
5 had Mr. Pochmara's name and Social Security number on it other
6 than the exhibits -- Government's Exhibits 24 and its sub-parts
7 in 25, which the Court has alluded to in response to the Railroad
8 Retirement Board.

9 At the same time that they point to their Exhibit 1,
10 saying, here, there is the name Robert Pochmara, the very same
11 time they are filing other documents with the federal
12 government -- this is a document submitted to the state
13 government. All the things that go to the federal government,
14 both to the IRS and to Social Security and the Railroad
15 Retirement Board totally omit Mr. Pochmara's name and Social
16 Security number.

17 They are not making things directly to the Railroad
18 Retirement Board but there is a connection between, as there was
19 testimony during the trial, the data between -- they shared as
20 far as income and Social Security numbers, between those three
21 entities. And by making everything that went to the federal
22 government false, Sue cannot stand here and Gary Wilson cannot
23 stand here and say, oh, yeah, that's not true, we reported his
24 name when this is a state document and at the very same time,
25 everything federal was without that information.

1 I think what they would like to ignore is the fact that
2 for eleven years, every week, they made out a paycheck, Gary
3 Wilson or Sue Wilson. And signed it, knowing and -- recorded it
4 on their records, knowing that that was not what was going on.
5 And to say that they were oblivious or somehow less culpable is
6 extremely inconsistent with the facts.

7 But I will like to respond to Mr. Rupp's argument in
8 part because it is not fancy on the part of the government. If
9 you look at the objective record, what he describes is to gloss
10 over the facts, that somehow all these things happened and there
11 is no actor behind it. But the objective record shows that
12 nobody gained more than his client. She gained more than Mr.
13 Pochmara and she wasn't even married to him and stood to keep
14 more up until the time it served their purposes relative to this
15 litigation to get married. So she definitely stood to gain more,
16 even than Mr. Pochmara.

17 So I think to the extent that the financial stake in the
18 outcome, yes, I think she definitely has the leading edge on
19 that. And the other factors that the Court referred to, her
20 fraud against her employer and other transactions that she
21 engaged in where she uses title to her favor when it works and
22 doesn't have title when it's not to her favor, that just shows --
23 I think it's sort of a 404(b) type of thing.

24 No, it doesn't directly go to leadership but it shows
25 that she has the ability and the sophistication to cut every

1 single cut so that she gets the better part of what's severed.
2 No matter how things are done, she comes out ahead. Everybody
3 else loses, her employer, her friends, everybody. They are the
4 ones who suffer the consequences of her actions.

5 THE COURT: Thank you.

6 MR. JACOBS: Briefly, your Honor, I would just like to
7 point out, of course, 3B1.1, you increase by four levels for five
8 or more participants if someone is an organizer or leader and we
9 still haven't even addressed that issue. There are only four
10 individuals involved in this matter.

11 THE COURT: Depends who how you look at it.

12 MS. PARKER: I think that's a fair characterization.
13 Depends on how you look at it.

14 THE COURT: And I'm not sure -- and I'm comfortable in
15 suggesting to you that the jury did not, that the directing the
16 tax reporting in the case at a minimum involved parties beyond
17 those that were indicted here. And I would respectfully conclude
18 that there are more than four involved on that basis.

19 As a preface to resolving this first variable, I must
20 say that I'm unhappy. I'm unhappy on a personal level in having
21 to sit and sentence these four individuals today. These are
22 people that I know and am comfortable, are good people, that made
23 significant contributions within their community. And have been
24 responsible members within their family.

25 And yet, we have this ugly problem to deal with. And it

1 is ugly in the sense that at least the Pochmaras pocketed in
2 excess of four hundred thousand -- we'll accept, let's say, three
3 hundred thousand worth of funds that they were at least obligated
4 to inform the Railroad Disability Board about. They cheated
5 someone out of a benefit as a result.

6 The difficulty in assigning a role in the offense is,
7 notwithstanding that ugly problem and good people, no one
8 wants -- no one really wants responsibility for the offense or to
9 necessarily describe the other parties' role in accomplishing
10 that.

11 The Probation Officer Burns concluded that both of the
12 Pochmaras were entitled to at least a two-level increase and I
13 think he is correct. They clearly were the beneficiaries,
14 necessarily involved in even the proposal for accomplishing the
15 fraud.

16 The Wilsons, in my view, cannot be described as having a
17 minor role in the process or even any suggestion of a more modest
18 role. All of the reporting that was required, essentially, over
19 an eleven-year period of time, necessarily require Mr. Wilson's
20 knowledge and participation and if you don't accept the argument
21 that any one of them could have stopped it, at least his role was
22 necessary.

23 I have struggled a bit more with Mrs. Wilson's
24 participation and concluded that while she is not entitled to any
25 reduction, I can't see a factual justification for suggesting

1 that she was a leader or manager in the same sense that the
2 Pochmaras and her husband were. The only way that I can connect
3 her at this point are these responses that were provided to the
4 Railroad Retirement Board, that while remarkable to me as
5 initially as I indicated in their naivete, were nevertheless,
6 while a complete misstatement of what was permissible under law,
7 were naively acknowledging of the facts.

8 She describes all of the income that the NAPA Auto Store
9 paid to Robert over the course of a number of years and then
10 leaves us with the suggestion that only Maxine works for the NAPA
11 Store and Robert works on her behalf. That's astonishing to me.
12 It was astonishing when I first read it. I can't at this stage
13 on that basis, however, reduce her role in the offense. On the
14 other hand, I don't see her as a manager or leader. I
15 distinguish her from the other three defendants.

16 Takes us to our next guideline question. The probation
17 officer recommended a two-level increase concerning the
18 Pochmaras' effort to, in his view, provide themselves some legal
19 protection by a prompt marriage in order to trigger the adverse
20 spousal testimony privilege.

21 The supplementary papers that I have received suggest
22 that's not why they did that, that the reason that they did that
23 was essentially grandchildren's requests, particularly at a point
24 where their -- things were not on stable ground with the
25 grandchildren's parents, that this is something that they wanted

1 done.

2 The government says that doesn't make any sense. The
3 grandchildren wouldn't have heard about the indictment. None of
4 it was public until after the date that they got married.

5 So I have a good understanding of the government's
6 argument. If we could hear from Pochmaras' counsel as to how you
7 think we ought to resolve that question.

8 MR. KOELZER: Your Honor, this is an extremely unusual
9 issue. I've never seen something like this where people who get
10 married are then accused of trying to set up a privilege. There
11 is one case that the probation officer cited, that presumably was
12 hand-delivered by the government to him, and I think that that
13 case illustrates why we don't have a similar situation.

14 In -- in *Blair*, which I discuss in my primary letter,
15 there is a witness who doesn't want to testify before a Grand
16 Jury, a female. So he and his -- the witness, the female, and
17 the male, talk to a lawyer and the lawyer says, if you get
18 married, you can avoid having to testify. And so they do. They
19 get married for the obvious purpose of setting up an adverse
20 spousal privilege.

21 Well, that case is certainly a far cry from our case and
22 one of the main ways, which -- which Mr. Rupp pointed out and I
23 want to kind of reiterate, is that it doesn't even make sense
24 because the holder of the adverse spousal testimonial privilege
25 is the witness spouse. I think we can all agree on that.

1 Well, in this case, each witness spouse has a Fifth
2 Amendment right not to testify in the first place so it's
3 completely duplicative of a right that they already have. But
4 even more basic -- and that just goes to whether they were tried.
5 I understand the government's position that it doesn't have to
6 make any difference or work as long as it was attempted.

7 But even more basic, which I probably should have
8 started with, is this whole thing attributes a level of
9 sophistication to Bob and Maxine Pochmara that is not even
10 close.

11 THE COURT: And I guess here is my question.

12 MR. KOELZER: Yes.

13 THE COURT: I accept your point. These folks maintain
14 their Fifth Amendment right. They didn't have to speak.
15 Plausible that there were reasons to get married other than to
16 impede the requirement that they furnish their testimony.

17 Do you intend to establish that through their testimony?

18 MR. KOELZER: No, your Honor, and I don't think we have
19 to. Certainly, the burden is on the government to show that my
20 client and his now wife got married for the purpose of attempting
21 to obstruct justice. I think the arguments I've made in writing
22 and today suggest that that's not why they did it.

23 We did suggest per the Court's invitation, that the
24 grandchildren's desire that they be married, did offer somewhat
25 of an explanation, although the time line is a little off. It's

1 been apparent from the start in this case that my clients have
2 stated that --

3 THE COURT: Well --

4 MR. KOELZER: -- the grandchildren wanted them to get
5 married from the start so --

6 THE COURT: Where did, by proximity in terms of time
7 chronology, the marriage occur in relationship to the problems
8 with Maxine's employer?

9 MR. KOELZER: I don't know the answer to that, your
10 Honor. I think -- I don't know if Mr. Rupp knows the answer
11 but --

12 THE COURT: Was getting married in any way responsive to
13 that particular problem?

14 MR. KOELZER: I don't know the answer because it relates
15 to Maxine.

16 THE COURT: Okay.

17 MR. KOELZER: So -- I know that per what I've read, that
18 it had an adverse effect on her.

19 THE COURT: Apparently.

20 MR. KOELZER: And I would suggest that that suggests
21 even more reason why they didn't get married for the purpose of
22 trying to obstruct justice or set up a privilege because it -- it
23 actually hurt her. But I will let Mr. Rupp deal with that.

24 THE COURT: Any other witnesses that you would like to
25 offer that would then be amenable to cross-examination on the

1 question?

2 MR. KOELZER: No, your Honor. I don't have any other
3 witnesses. I just wanted to be at least clear from our
4 perspective that the government has the burden and has the
5 burden -- we always hear about circumstantial evidence. This is
6 a circumstance, is all it really is, a circumstance which is that
7 my clients got married at a time between the letter saying you
8 have been indicted and their first court appearance, you know, in
9 connection with that indictment.

10 I -- I really -- perhaps I'm not the smartest guy around
11 but I really don't see where that, in and of itself, and I think
12 concessions should abound but that's all there is. There is
13 nothing else here. There is nothing like in *Blair*.

14 There is no meeting. There is not even a level of
15 sophistication of the defendants that would suggest that they
16 would have any idea about -- I mean, we can dissect the spousal
17 privilege and the marital communications privilege and the
18 marital communications privilege wouldn't have been in effect
19 because they weren't married but there is also a joint criminal
20 activity exception. There is -- there is ups and downs and
21 nuances everywhere in the law.

22 And to suggest that Bob and Maxine Pochmara, simple
23 folk, as Mr. Rupp said, would get married for the purpose of
24 trying to set up a privilege so that they could not have to
25 testify against the other, when they didn't have to testify

1 against the other ever, anyways, it just doesn't make sense to
2 me. I realize that the force with which the government is
3 arguing it and the Court's treatment of it suggests that the
4 Court believes there is something to this theory.

5 I don't think it's close. And it's not just because I'm
6 their lawyer and I have to think that way. I just look for more.
7 I understand circumstantial evidence. I spend a lot of time at
8 parties with people and people try to say circumstantial evidence
9 is weaker than direct evidence. Well, not in the O.J. Simpson
10 case, for example, so I understand that circumstantial evidence
11 can be powerful.

12 This is about as weak as it gets, I believe, because it
13 is literally just one circumstance and the other evidence that's
14 out there to suggest which way -- what were Bob and Maxine
15 Pochmara really thinking. I think the other evidence out there,
16 besides the timing, suggests that they had no such thought about
17 trying to set up a privilege.

18 THE COURT: I've been getting kind of a refresher course
19 as I try, however unsuccessfully, to assist my son as he is
20 studying the concept of probability in mathematics --

21 MR. KOELZER: All right.

22 THE COURT: -- which attempts to assign a statistical
23 examination of the likelihood of one event occurring in relation
24 to another.

25 How many years had it been since the Pochmaras were

1 divorced before they decided to be remarried?

2 MR. KOELZER: Approximately 31, your Honor. I -- I
3 understand the Court's question about probabilities as it is a
4 subject near and dear to my heart but we also have a human
5 element here. And the human element is after living their whole
6 lives without any trouble, they get indicted in Federal Court and
7 the fact that they -- and this was a couple -- this was at least
8 a couple of weeks after they got the letter and, you know, if
9 they were distraught and banded together emotionally and got
10 drawn closer together, the grandchildren always wanted us to get
11 married anyways, let's just get married. I mean, that's, to
12 my eyes, to my ears, a more plausible explanation. But
13 certainly, the government's explanation I don't think carries its
14 burden.

15 THE COURT: I appreciate your point. Mr. Rupp?

16 MR. RUPP: Thank you, your Honor. Again, I join and
17 agree with the comments made by Mr. Koelzer and --

18 THE COURT: May I understand that you don't have any
19 witnesses to offer either?

20 MR. RUPP: That is correct.

21 THE COURT: Okay.

22 MR. RUPP: And just from my personal involvement in this
23 case, your Honor, I remember going back as early as the original
24 detention hearing, this is a theory or an argument that was
25 provided by the government that they had gotten married just a

1 couple days before appearing for the indictment -- excuse me --
2 to preserve or create some kind of spousal privilege, one
3 ultimately that even if that was their goal, doesn't apply here
4 and is duplicated by the Fifth Amendment.

5 In talking with them and Mr. Koelzer at that very first
6 time meeting them in the hallway upstairs, why did you get
7 married? It was for the kids, for the grandkids. Meeting with
8 Mr. Burns at the pre-sentence interview, well, why did you get
9 married when you did? It was for the kids, for the grandkids.

10 It has come up repeatedly during our discussions and our
11 briefings prepared ultimately for today's sentencing, why did you
12 get married? For the kids, for the grandkids. I submitted to
13 the Court with my supplemental briefing a letter from her
14 grandson as well as her ex-daughter-in-law, mother to the
15 grandson, that corroborates --

16 THE COURT: Well, let's -- to be sure, they are not
17 going to be witnesses amenable to the government's
18 cross-examination.

19 MR. RUPP: That is true.

20 THE COURT: All right.

21 MR. RUPP: But they did write letters on their behalf,
22 at least substantively corroborating the explanation that this
23 was something that came to the grandchildren's attention that
24 bothered them and that that was the motivation for eventually
25 finally getting remarried. And I think as I explained to some

1 extent in my supplemental briefing, that the service is something
2 that occurred at the county building up in Rogers City.

3 MS. PARKER: I'm going to object, your Honor. He is now
4 going into things which he is not prepared to provide testimony.
5 If he wants to use musical lyrics and imaginations in response
6 to try to establish laws and facts, that's fine, but I don't
7 think we should indulge a hearing where all we're doing is having
8 his description of something that nobody is willing to testify
9 to.

10 THE COURT: Would you like to continue?

11 MR. RUPP: Your Honor, the only thing I would add I
12 guess then is that in response to my supplemental briefing, the
13 government points out that the grandchildren potentially learning
14 about this through media attention as I suggested is impossible
15 because of the sealing of the indictment.

16 If that's the case and I can only offer my own
17 responsive speculation, is that perhaps the grandchildren -- the
18 grandchild who wrote the letter had the sequence of events
19 confused. But I would note that as part of the government's
20 materials and government's exhibits, somewhere along the line --
21 frankly, I've lost track of where everything falls in -- the
22 Pochmaras received a letter at the end of September indicating
23 they needed to report to Court two or three weeks later for the
24 indictment.

25 Somewhere along the line, the family let the

1 grandchildren know they weren't married. It bothered them and
2 that is our offered explanation for it rather than the theory
3 that it was to create a spousal privilege. Again, one that as a
4 practical matter doesn't apply here and couldn't apply here and
5 would effectively make it no different than wishing on a falling
6 star or a broken wishbone.

7 THE COURT: I appreciate that. Did you have some
8 concluding comments?

9 MS. PARKER: Yes, your Honor.

10 One of the questions you asked of counsel for Mr. and
11 Mrs. Pochmara that they did not address today was when did the
12 problem Maxine Pochmara have with her legitimate employer arise
13 relative to her marital status?

14 And I would point to Defendant's Exhibit C appended to
15 Maxine Pochmara's response to the Court's order which is a letter
16 dated December 4, 2012, approximately two months after the
17 nuptials, that list or basically says, a demand letter for the
18 overpayment of medical benefits on behalf of Robert Pochmara
19 due to Maxine Pochmara's false representations that Robert
20 Pochmara was her husband during her period of employment with
21 Mid-Michigan -- or Northeast Michigan, excuse me, Community
22 Mental Health Services.

23 So I think that again puts the time line back into, to
24 answer one of the things the Court also suggested, 365 days,
25 times 31 years, is approximately 11,400 plus days, that the

1 Pochmaras could have chosen to get remarried. We're skipping
2 leap years and things like that. They had plenty of other days
3 when they could have decided to get remarried. But, no. To her
4 employer, they represent they are married. On their federal
5 income tax returns, they represent that they are not married
6 because that suits their purposes.

7 To say somehow that the Fifth Amendment privilege would
8 have prevented an obligation to testify, that's simply not true.
9 I can get a compulsion order. I cannot get a compulsion order to
10 overcome a spousal privilege but I can get a compulsion order
11 when people are married. But that's not the point.

12 They don't have to function at that level of legal
13 sophistication. They are quite able to function at the level of
14 how do we cheat and steal everybody in sight, our employers,
15 everybody. And the most reprehensible part of all of this, not
16 only did they try to use a marriage two days before their
17 arraignment to create a privilege, but then they use what they
18 purport to be letters from their families. And we do not know
19 that. Those are not certified letters. They are not notarized.
20 There is no jurat.

21 As far as I know, the same people who fraudulently
22 created other documents in this case to misrepresent the truth,
23 could have fabricated those letters. We don't know because we
24 don't have anything under oath. There is no evidence.

25 But even if they did write them for them, it was

1 obviously not accurate recall. It was totally a
2 misrepresentation of what could have happened, that they were
3 willing to do out of their affection for the Pochmaras, if those
4 in fact were even written by the family members. And that is
5 even more reprehensible to come to the Court and expect this
6 Court to buy that when the objective facts show that there was
7 nothing public about the indictment until the day of their
8 arraignment.

9 They got married two days before their arraignment.
10 They had time to make those arrangements, to get the blood tests,
11 do all that stuff and get married.

12 THE COURT: What about the possibility that they got
13 married in an effort to try to resolve the problems with respect
14 to their maintenance of health benefits through her employer?
15 Would be unrelated to any obstruction of justice in the context
16 of this case.

17 MS. PARKER: Well, that didn't become a problem until
18 the fact that they weren't married came to light and so that
19 wouldn't retroactively fix the problem.

20 The demand letter which is Exhibit C, it's roughly -- it
21 looks like it's about \$50,000 in overpayments over the prior
22 course of time. That would only fix a problem going forward.
23 And there was an alternative fix, just not claim Robert Pochmara
24 as a spouse. Just accurately represent the situation, and
25 continue on in that way and just not give him benefits

1 fraudulently.

2 But I submit to the Court, these people, Maxine's
3 employer became aware of it because of the indictment, because of
4 the -- it was an issue at the arraignment because that's when I
5 found out that they had gotten remarried. And there were people
6 who ordered copies of the transcript of the arraignment because
7 this is a case of some notoriety up in the Rogers City area.

8 But it's not in the government's press release, it's not
9 something that was known until it was brought out at the
10 arraignment. And to try to fabricate now an explanation that it
11 was for the grandchildren, as if -- I had the good fortune to
12 have two sets of grandparents for, long enough that I can at
13 least remember them and one up through -- I was through law
14 school or into law school. To think that my affection for them
15 would somehow be adversely affected, or any other grandchild's
16 affection for their grandparents might be affected by their
17 marital status, especially in today's attitudes toward marriage,
18 is just ludicrous.

19 But the time line is what totally demonstrates that this
20 is yet another lie on top of the obstruction by committing
21 marriage. Just another way to try to deceive the Court and to
22 avoid the consequences of their action.

23 Thank you.

24 THE COURT: I appreciate your remarks. There are a lot
25 of similarities.

1 MR. RUPP: May I respond just briefly, your Honor?

2 THE COURT: Briefly.

3 MR. RUPP: With regard to the -- just a couple random
4 comments -- that there was time for them to get blood tests.
5 Blood tests are no longer required in Michigan. I would suggest
6 that the letter from her employer, the problem arising two months
7 after the marriage takes place, highlights or demonstrates that
8 getting married wasn't to her benefit, in fact, hampered her
9 through her employer. And I had a third point but it escapes me
10 now.

11 THE COURT: If you think of it, let us know.

12 MR. RUPP: I will, your Honor. Thank you.

13 THE COURT: There is a remarkable similarity of this
14 issue to the first one. From my point of view, there is
15 overwhelming circumstantial evidence of a particular fact --

16 MR. RUPP: I -- I did remember the point.

17 THE COURT: You did remember, okay.

18 MR. RUPP: I did. The government argues and if her
19 theory is correct, that they married to create this spousal
20 privilege in an attempt to obstruct justice and then employed or
21 abused the grandchild into writing a letter, I would agree that
22 that is reprehensible behavior.

23 I don't believe that Maxine Pochmara is that
24 reprehensible character who would exploit her grandchildren to
25 avoid a two-point increase at her sentencing. As the Court

1 indicated earlier this morning when we began, that this is a
2 troubling scenario to be sentencing these people. She is not
3 that reprehensible person.

4 THE COURT: And yet, apart from a guilty plea, I've
5 never had an opportunity to have any other experience with her.
6 And my suggestion here is not that they have an obligation to
7 take the stand or to bring their grandchildren in to corroborate
8 an accusation.

9 It just simply is the fact that there is, like with
10 respect to the first issue, overwhelming circumstantial evidence,
11 if one assesses the likelihood of the events, to suggest that the
12 marriage, after a 30-year hiatus, had any particular function
13 other than potentially to impede the necessity for disclosing
14 information.

15 And I'm satisfied that the circumstantial evidence in
16 this circumstance warrants that conclusion. I believe that the
17 two points are appropriately assessed.

18 Which takes us to the next issue. We have more than
19 circumstantial evidence. We had two witnesses that testified
20 during the course of the trial that after subpoenas were issued
21 by the government, that Mr. Wilson made statements to them that
22 made them believe that he was attempting to alter or at least
23 advise them against providing testimony.

24 So like the first two questions, we are dealing -- where
25 we were dealing with circumstantial evidence, in my view,

1 overwhelming circumstantial evidence that nobody wanted
2 particularly to dispute, we have a circumstance now where we have
3 direct evidence from two witnesses and we would like to argue
4 with those witnesses now, correct?

5 MR. JACOBS: That's me, your Honor. Yes. And I -- and
6 I previously informed the Court that Gary Wilson would like to
7 take the stand as to that issue.

8 THE COURT: Well, let's -- we will entertain the
9 gentleman.

10 MR. JACOBS: Call him at this time?

11 THE COURT: Please.

12 MR. JACOBS: Mr. Wilson.

13 THE COURT: Good morning, sir.

14 THE WITNESS: Good morning, your Honor.

15 THE COURT: If you could stop for just a moment and
16 raise your right hand.

17 Do you solemnly swear that the testimony you are about
18 to provide will be the truth, the whole truth and nothing but the
19 truth so help you God?

20 THE WITNESS: Yes, I do, with the help of God, your
21 Honor.

22 THE COURT: If you would like to have a seat, please.

23 GARY WILSON

24 Having first been duly sworn at 11:03 a.m., testified as follows:

25 THE COURT: And while the gentleman is making his way to

1 the witness stand, one thing I have not had a chance to go back
2 and identify were the names of the two witnesses that I recall
3 from the trial.

4 MR. JACOBS: I would have to ask Miss Parker for
5 assistance.

6 THE COURT: Actually, I'm comfortable that Mr. Wilson
7 will know.

8 MR. JACOBS: My client will acknowledge conversations
9 and will identify individuals. I -- I just don't have it written
10 in front of me.

11 MS. PARKER: Judge, I'm drawing a blank. Stanley was
12 the name of one of them and it was a Polish --

13 THE WITNESS: Steve Porter is the other one.

14 MR. JACOBS: Hang on. The judge will ask you in a
15 minute.

16 MS. PARKER: And I'm drawing a total blank on the other
17 one. But those were just representative witnesses.

18 THE COURT: And Mr. Jacobs is right, I can absolutely
19 assure you that Mr. Wilson remembers those names. So we will
20 take the testimony, sir.

21 DIRECT EXAMINATION

22 BY MR. JACOBS:

23 Q. State your full name.

24 A. Gary Lee Wilson.

25 Q. You heard two people testify at trial that they had

1 conversations with you prior to their testifying, is that fair to
2 say?

3 A. That is correct.

4 Q. Who were those two people?

5 A. Ah, I talked to Steve Porter and Stanley Krajnik.

6 Q. Stanley --

7 A. Krajnik.

8 Q. Krajnik. And Steve Porter?

9 A. Steve Porter, that's correct.

10 Q. All right. First, as to Stanley, what if -- do you recall,
11 in relationship to their testimony, when you talked to him?

12 A. Well, it was on a Monday morning. Because on a Monday
13 morning is when I usually run out of cash flow from the weekend
14 so I knew I had to go to the bank. I went up front to tell the
15 young gentleman who -- who is in charge of the counter men up
16 front -- his main position is to make sure all these other
17 counter men knows what's going on. He needs to make sure how much
18 cash is in that cash box and --

19 Q. Hang on, Gary.

20 A. -- how much cash is in the drawer.

21 Q. Stay with me.

22 A. I just like to talk.

23 Q. I know. So we are going with when. Was it after the
24 government sent us a witness list and we had names of their
25 different witnesses?

1 A. Yes, it was.

2 Q. Okay. So it was after we got a witness list.

3 A. Yeah.

4 Q. And you were aware that Steve Porter's name was on the
5 witness list and Stanley -- and I slaughter Stanley's last name.

6 A. Krajnik.

7 Q. Krajnik. Krajnik's name was on the witness list. All
8 right. So that day, that Monday, you were talking about things
9 happening. Was someone in the store, one of those two
10 individuals in the store?

11 A. No. As I was stating, I rattle, I went up front to get
12 everything organized so I could go to the bank. There happened
13 to be a set of rear brake shoes and a spring kit that goes with
14 this job and Justin turned to me and said, Gary, if you're going
15 up town, would you please drop those off at Stan's place of
16 business.

17 Q. All right. What's Stan's place of business?

18 A. K.J. Alignment.

19 Q. Okay. So you actually went to K.J. Alignment.

20 A. Yes.

21 Q. Dropped off a part.

22 A. That's correct.

23 Q. All right. Did you talk directly to Stanley?

24 A. Yes and no.

25 Q. Okay. What do you mean by that?

1 A. I went into the shop, I talked to Fred Osberger, who is a
2 member, sits as a trustee of our church, and we had a
3 conversation about the church. And I walked through, went up to
4 the counter while -- or the bench, the workbench where Stan has
5 all these tools and these parts and it's just -- it's a mechanic
6 thing. So I went up there, set the parts down. Stan was over on
7 the other side of the room.

8 I said, "Stan, I'm dropping these parts off for you."

9 "Thank you, Gary. By the way, Gary, why did I get a
10 subpoena to come to court on behalf of you?"

11 I said, "I guess they want information from you, Stan."

12 "What kind of information?"

13 I said, "I don't know. Probably the same information
14 that Jeff Hackett gave."

15 He said, "Well, Jeff Hackett told me all this
16 information that I gave to him was on behalf of Robert Pochmara.
17 Had nothing to do with you."

18 I said, "Well, I don't know what to tell you, Stan." I
19 said, "If that's what you were told, then you were told that."

20 You know, there is things in life, it's how close are
21 you to becoming a lie and how far is it in between that is really
22 the actual truth? You know, this was -- Stan says, "Well, what
23 do I do?"

24 "You take the stand. You know, you've got to." I said,
25 "But remember one thing, Stan. Don't get up there and tell any

1 lies."

2 "Why?"

3 I said, "Because you will be in big trouble." I said,
4 "For one thing, that's perjury. Now the government is going to
5 come after you like they are coming after me. And second of all,
6 don't say anything bad about my company or myself," I said,
7 "Because it always opens the opportunities."

8 And that's all I said.

9 Q. "Don't say anything bad about my company or myself." What
10 did you mean by that, sir?

11 A. Lies, you know. In a small town, you know, I thought a
12 small town was like Bay City but I found out it's not. But, you
13 know, in respect, it is, because in a small town, if you told
14 somebody some gossip, in a small town, it's like rolling a marble
15 down the street. When it hits the other end of the street,
16 you've got a bowling ball. And I believe that marble was taken
17 way out of content and rolled down the street and blowed up into
18 a situation that a man that I grew up with -- when I first
19 started in mechanic business, I walked in to Johnny's Buick and
20 guess who the first person I ever met in Rogers City was? Stan
21 Krajnik.

22 Q. All right. Did you tell Stan that you were going to sue
23 him?

24 A. No, I did not.

25 Q. We heard testimony at trial where somebody said you were

1 going to sue them.

2 A. Who -- where did that come from?

3 Q. Never mind. I will ask you about the -- so, no, you don't
4 believe you said anything to him about suing him.

5 Sir, it's hard for you to testify as to your own
6 reputation in your community but do you -- have you sued other
7 people in the Rogers City area?

8 A. I can sit here under oath and state I, in my entirety of my
9 life, have never had the opportunity to threaten anybody or have
10 I ever sued anybody in my entire life, not even my own father.

11 Q. Well, you --

12 A. I think it was very disrespectful not only to me and to my
13 father but disrespectful for anybody without any type of evidence
14 against me, to have that brought into this courtroom,
15 disrespectful to the judge, disrespectful to the oath that was
16 taken by Janet Parker.

17 Q. All right. Did you -- did you fall off your father's roof
18 when you were working on his roof? Just yes or no.

19 A. Yes.

20 Q. Did you fall off -- yes, okay. And you were injured. Is
21 that -- yes or no.

22 A. Yes.

23 Q. All right. Did you sue your father as a result of that?

24 A. No.

25 Q. All right. Did you get some insurance money as a result of

1 it?

2 A. No.

3 Q. Okay. Did you --

4 A. As a matter of fact --

5 Q. Hang on, no, no. I don't want you to volunteer other stuff.

6 A. All right.

7 Q. Now, your son has special needs, one of your children, is
8 that correct?

9 A. Yes, he does, you're correct.

10 Q. And at some point in time, didn't your spouse sue the
11 doctor?

12 A. My son and my wife sued an incompetent doctor, yes, they
13 did.

14 Q. You weren't involved in that lawsuit.

15 A. No, I was not.

16 Q. All right. But your mother, on behalf -- your spouse, on
17 behalf of your son, filed a lawsuit, a medical malpractice claim
18 against the doctor.

19 A. That's correct.

20 Q. All right. And they received some monies on behalf of your
21 son, is that correct?

22 A. That is correct.

23 Q. All right. Let's talk about the other person. The other
24 person is Steve Porter?

25 A. That's correct.

1 Q. All right. Did you have a conversation with Steve Porter
2 before the trial?

3 A. Steve Porter came into my store and I believe -- it was not
4 in the morning, it was in the afternoon, between Monday and
5 Friday. And he was digging, trying to get me to give him some
6 information about Bob, what's going on with Bob. And I told
7 Steve, I have no idea what's going on with Bob.

8 And the only conversation that I ever had with Steve
9 Porter is I -- I stated to Steve, about my company, the years
10 I've had in my company, all the good I've done in my company. I
11 believe I can hold all my enemies in one hand. I just couldn't
12 believe that there would be anybody in Rogers City that would
13 have the audacity to get up there and state that I make any type
14 of threats towards them.

15 The only thing I stated was that anybody that would get
16 up there and hurt myself, my company, my 21 years of my life, and
17 tell lies, would open their arms to some type of percussion, you
18 know.

19 Q. Some type of repercussion, is that what you just said?

20 A. Yes.

21 Q. What did you mean by some type of repercussion?

22 A. Well, I go right back to that word, you know. That, you
23 know, if somebody says something about you and your company, you
24 know, they can be held responsible, you know. We are back to
25 that word, that one word.

1 Q. Which is what?

2 A. Hang on. My mind just went blank. I have a -- I've been
3 diagnosed with short-term memory.

4 Q. Okay.

5 A. That word is -- hang on. My mind has come to a standstill.

6 THE COURT: Mr. Rupp, any suggestions?

7 MR. RUPP: I thought he was talking about repercussion.

8 BY MR. JACOBS:

9 Q. Did you ever threaten anybody?

10 A. No, I have not, Steve.

11 Q. All right. Do you see where somebody might say threatening
12 to sue someone is in essence a threat? Do you follow me with
13 that?

14 A. There is a word for suing somebody. That's called
15 defamation of character.

16 Q. All right.

17 A. I believe it's -- it's -- it gives citizens the right to
18 stand up in what they believe in for somebody lying and stating
19 things that are incorrect about them.

20 Q. And it is true that you --

21 A. I -- I may have used the word.

22 Q. You let people know that if they defamed you, if they said
23 false things about you and about your business --

24 MS. PARKER: Objection. Leading.

25 THE COURT: Sustained.

1 BY MR. JACOBS:

2 Q. All right. What message were you trying to get across to
3 Steve Porter?

4 A. Absolutely none.

5 Q. Well, were you telling him don't testify?

6 A. No, absolutely not.

7 Q. Were you trying to keep him from testifying?

8 A. Absolutely not. No.

9 Q. Were you trying to sway his testimony?

10 A. No.

11 MR. JACOBS: Nothing further, your Honor.

12 THE COURT: My presumption is that none of the other
13 defense counsel would have any questions of the witness. Am I
14 correct in my understanding?

15 MR. PIAZZA: Not on this issue, your Honor.

16 MR. KOELZER: That's correct, your Honor.

17 MR. RUPP: Correct.

18 THE COURT: Cross-examination?

19 MS. PARKER: Thank you.

20 CROSS-EXAMINATION

21 BY MS. PARKER:

22 Q. Mr. Wilson, how many people on the witness list did you talk
23 to?

24 A. Have I talked to?

25 Q. Between -- I should clarify that. I'm sorry.

1 A. On a daily basis or --

2 Q. No, please allow me to rephrase it. Between the time that
3 you became aware of who was on the witness list and the start or
4 the end of the trial, how many of the people on the government's
5 witness list did you talk to?

6 A. Steve Porter that came into my store and Stan Krajnik that I
7 dropped parts off to.

8 Q. And those -- your testimony is those are the only two that
9 you talked to?

10 A. About the case, yes.

11 Q. And -- I'm sorry, maybe I didn't hear the answer but did you
12 have an occasion where you were injured while working on your
13 father's roof?

14 A. It actually was my son -- would have been my
15 brother-in-law's because he had purchased that home from my dad
16 and my dad had a life lease. They could stay there and live
17 there as long as they wanted. But I did fall off that roof that
18 I grew up -- in the home I grew up in, yes.

19 Q. And did you collect insurance money over that?

20 A. No, I did not. They never even paid my medical.

21 Q. Does Steve Porter have a business of his own?

22 A. Steve Porter has many businesses, yes, he does.

23 Q. And that's in the same community that you're in.

24 A. Yes.

25 Q. And I'm going to call him Stanley because I will massacre

1 his last name.

2 A. He's Polish.

3 Q. Yeah, I'm sorry. I can usually get Polish names but I don't
4 have it written down and I'm forgetting it, so I'm sorry. Does
5 Stanley have a business in Rogers City?

6 A. That's correct, yeah, K.J. Alignment.

7 Q. And in addressing or discussing the witnesses with Mr.
8 Porter and Mr. Stanley, did you mention defamation?

9 A. Steve Porter brought that word to my attention and where he
10 heard it, I don't know, but he asked me, can people be sued for
11 defamation of character? And I don't recall the comment I made
12 on that. I really don't.

13 Q. So you're attributing it to him now and not to you.

14 A. He's the one that said that to me when he came into my store
15 and was digging for information, that's correct.

16 Q. And did you use the term when you were talking to Stanley?

17 A. And what was that term?

18 Q. Defamation.

19 A. I mentioned to Stanley that if people would get up and lie,
20 that they can be sued for defamation of character. And they can
21 also be charged for perjury.

22 Q. And the lawsuit that your son and your wife were involved
23 in, was that against a local doctor?

24 A. Yes, it was.

25 Q. Was there local publicity over that?

1 A. No, because the trial was held down here in Saginaw.

2 Q. There was never any reporting of what happened on that case?

3 A. Not that I'm aware of.

4 Q. You don't think everybody in the community knows about that?

5 Or most people?

6 A. We're -- we've got a marble on one hand and a bowling ball
7 on the other. You know --

8 Q. No.

9 A. -- you're talking small town gossip. How can we balance
10 that knowledge? I -- I don't understand your question, Janet.

11 Q. I think I will leave it there. Did you tell Mr. Porter that
12 if anyone hurt you or your company, they would be subject to
13 repercussions?

14 A. No, I did not.

15 Q. Who did you say that to?

16 A. I only talked to Stanley. He's the one that approached me
17 with that word, defamation of character.

18 Q. No. It's a different question, sir.

19 A. Oh, I'm sorry. Then I would ask you to repeat the question.

20 Q. Did you say to Mr. Porter, that anyone who hurt you or your
21 company would be subject to repercussions, or words to that
22 effect?

23 A. I just said they could be sued for defamation of character.

24 MS. PARKER: Just a moment, your Honor. Pass the
25 witness, your Honor. Thank you.

1 MR. JACOBS: I have no further questions of Mr. Wilson
2 regarding this. Of course, later on this morning, we have a lot
3 of exhibits as to the financial information. I will be asking
4 Mr. Wilson about that financial information, your Honor.

5 THE COURT: We will take it up then.

6 THE WITNESS: Could I read a letter, your Honor?

7 MR. JACOBS: No. No.

8 THE WITNESS: Can --

9 MR. JACOBS: No, I don't want you to read a letter.

10 THE WITNESS: Why not?

11 MR. JACOBS: I want you back here.

12 THE WITNESS: Can I give these letters to you, your
13 Honor?

14 MR. JACOBS: Why don't you and I talk about that during
15 a break.

16 THE WITNESS: One is from my daughter and the other one
17 is from my son.

18 MR. JACOBS: Well, that's something that you and I can
19 talk about during the break, okay?

20 THE WITNESS: Well, will I have the opportunity to come
21 back up here again?

22 MR. JACOBS: Yes, you'll have an opportunity to come
23 back up again. We're going to put you up regarding another
24 issue.

25 THE WITNESS: Okay. I'll live with that.

1 THE COURT: You're excused.

2 THE WITNESS: Thank you, your Honor.

3 (At 11:22 a.m. - witness steps down)

4 THE COURT: If not earlier, even the last interchange
5 with the witness, I think, is important to understanding how this
6 issue needs to be resolved. As we spoke about earlier on in the
7 context of an earlier variable, Mr. Wilson and Mrs. Wilson have
8 not received any economic benefit. To use some of the language
9 from counsels' -- counsels' supplementary memorandum, they were
10 approached about the way in which Mr. Pochmara's pension benefit
11 could be protected.

12 They didn't receive any money at all. They are in this
13 courtroom as a result of the fact that in his view, friends, they
14 merely facilitated Bob's effort to retain that disability
15 payment. And he's mad as hell that he's in this courtroom. He's
16 mad as hell about all of the events that have taken place and the
17 accusations that have been made when he has lived his life in the
18 way that he has.

19 And when approached by these two other individuals, he
20 viewed himself as merely cautioning them that they damn well
21 better tell the truth when they get on the stand and that
22 repercussions could follow if they didn't. And he sees that as
23 an honest way of cautioning them under circumstances where he's
24 besides himself about the nature of the accusations that are
25 being made.

1 But I don't believe his intention was simply to offer
2 good faith suggestions in their interests to be sure that they
3 told the truth. I heard those witnesses. They knew that. The
4 reason those statements were made by a man that was enormously
5 upset about the circumstance that he found himself in was to
6 caution them to not consider anything that might suggest his
7 responsibility. He intended that they understand, indeed used
8 the language in one set of circumstances, that there would be
9 repercussions. He was attempting to make sure that they
10 understood that their testimony needed to tow the line. His
11 purpose was to be sure that their testimony followed in the way
12 that was most favorable to him.

13 I respectfully would find on the basis of the
14 testimony that we've received that his intention was to obstruct
15 justice.

16 MR. JACOBS: Yes, sir.

17 THE COURT: The next issue is the amount of loss. We've
18 talked about this a short time earlier. The reference made in
19 the pre-sentence report is to a figure of \$325,500. During the
20 course of a series of briefs, we have discussed the question as
21 to the appropriate attention to the Social Security benefit that
22 would have accrued to Maxine Pochmara as a result of the fact
23 that she was in effect adding Robert's salary to hers for
24 purposes of calculation of the Social Security benefit.

25 She would have been -- or Robert would have been

1 responsible for -- it's seven percent of the reduction from his
2 compensation and seven percent from the employer. The end result
3 is that in a series of documents that the probation officer
4 received, that the Social Security Administration asked to
5 maintain private, reflected a pension benefit, if Mrs. Pochmara
6 were to live to an appropriate life expectancy for someone her
7 age and to begin to draw that at 66 years, and they assessed her
8 life expectancy at 20.9 years, that they mark the value of the
9 benefit, would be \$74,500.

10 The important point here is that when added to the
11 \$325,000, we end up with a figure that would exceed the guideline
12 variable of four hundred. The probation officer, Mr. Burns, had
13 originally assessed the guidelines based on a range of two
14 hundred to \$400,000.

15 Let's begin first with the number that was included in
16 the government's supplementary papers, \$428,585. If the
17 government could clarify the manner in which that was calculated
18 and I want to make sure that the defendants have had the
19 opportunity to review those calculations.

20 MS. PARKER: As I understand it, and I believe Agent
21 Hackett will correct me if I'm wrong, that's basically a
22 print-out that was done just listing the payments that were made
23 to Robert Pochmara by the Railroad Retirement Board for
24 disability benefits from the time he started receiving benefits
25 until the date -- until the time he pled guilty. It's just a

1 straight line calculation of the actual numbers. They are not
2 adjusted for inflation or anything like that.

3 THE COURT: In terms of the guideline calculation, is
4 there any reason why -- and perhaps I would solicit some advice
5 from Probation Officer Burns, if he is familiar with that -- is
6 there a reason why the guideline would limit at least Mr.
7 Pochmara's assessment to the \$325,000 if he continued to receive,
8 what, another \$103,000 after that point in time?

9 MR. BURNS: The only reason that I can see, on the
10 limitation of the amount collected, would be because the offense
11 conduct for the offense, him working at NAPA Auto Parts, had
12 ceased after March of 2009. It is then the collection of
13 Railroad Retirement Board disability funds may be viewed as
14 legitimate since the Railroad Retirement Board funds have no
15 reason to shut it off and he is not committing a criminal act at
16 that particular time.

17 THE COURT: Do you know whether or not there was any
18 disclosure to the Railroad Retirement Board by Mr. Pochmara after
19 the indictment?

20 MR. BURNS: That would be something that the government
21 or maybe the case agent may be able to speak on.

22 MR. KOELZER: Your Honor, I'm sorry to interrupt you.
23 I'm just trying to make sure we don't have a math problem here.
24 The original figure we got originally in discovery was \$218,000.
25 Then including from '09 up until some date, the date of the plea,

1 roughly, that's what makes it \$325,000.

2 The government's theory, late-arriving theory, that it's
3 somehow four hundred eighteen thousand or four hundred
4 twenty-eight thousand, requires us to go backwards from the
5 beginning of the conspiracy -- yeah, from the beginning of the
6 conspiracy, which was in, about '99, roughly, back to '91, under
7 the theory that my client was disabled throughout the entirety of
8 his receipt of disability benefits.

9 So I guess I just want to make sure that we are all
10 talking about the same thing. When the \$325,000 came up, it was
11 not that big a -- we all knew where the grades fell, two hundred
12 to four hundred. Whether it was two eighteen or three
13 twenty-five, the guidelines were the same. And we didn't --
14 didn't really even think about questioning the three twenty-five
15 or where it came from or why did it change from two eighteen.

16 But to be clear, unless I'm not -- unless I'm not clear
17 in my own mind, the way to get over four hundred thousand, is to
18 go back and cover from '91 to '99. That's an additional,
19 approximately one hundred thousand. So --

20 THE COURT: Now, we've been in here approaching two
21 hours. We need a break in any event but that's also, I think, an
22 opportunity to review at least with Miss Parker and the agent
23 their calculations and source of the numbers so that you can
24 reach a level of satisfaction on that.

25 MR. KOELZER: I agree, your Honor, just so we are all

1 arguing about the same thing. That's my only point for standing
2 up at this point. So --

3 THE COURT: Just in terms of length of available time, I
4 don't have anything until two o'clock this afternoon. I don't
5 know if other parties have conflicting schedules. It's gone a
6 little bit longer than I anticipated but I think that's
7 consistent with the way the case has been.

8 MR. KOELZER: I don't, your Honor. I mean, I'm --

9 MR. PIAZZA: I just have to be upstairs at four o'clock
10 so --

11 THE COURT: Which of the two locations?

12 MR. PIAZZA: Magistrate's.

13 THE COURT: We will take about a ten-minute break and we
14 will return. Record is closed.

15 (At 11:34 a.m. - proceedings recessed)

16 (At 11:50 a.m. - proceedings resumed)

17 THE COURT: Miss Parker, have you and the gentlemen had
18 a chance to review the figures with defense counsel?

19 MS. PARKER: To some degree, your Honor, yes, I did. I
20 don't know that we've arrived at any essential agreement but my
21 position is, as I previously stated, the Wilsons would not be
22 responsible for any loss attributable to the time period after
23 they no longer continued in the arrangement but I would submit
24 that Robert Pochmara is for a couple of reasons, one of which
25 the Court has already alluded to -- and I would submit, Maxine,

1 also. They continued to collect the money and use it.

2 And if you refer to Government's Exhibit 23 from the
3 trial which was a document that was sent to Mr. Pochmara in 2008,
4 which there were reports that he had to make, as you recall the
5 testimony was, every year, in the fall, as to whether there was
6 any change in condition.

7 And in August of 2008 or thereabouts, they sent out a
8 Continuing Disability Report which in Section 5, asks the
9 defendant to describe any change for better or worse in his
10 condition, if any, during the period covered by the report. And
11 this is a continuing thing. The defendant never reports an
12 improvement in his condition. It's always continued to be the
13 same.

14 So I think the record that the defendant has created in
15 this case and if the Court would want, I can present Mr.
16 Hackett's testimony, who has reviewed the entire file, every
17 single report for every year, there is never a report that, I'm
18 better now, I can do light duty work or I can do something else.
19 I mean, there are other questions in there that defendant, Mr.
20 Robert Pochmara, doesn't answer candidly but as to his condition,
21 it always is the same or worse. It's never an improvement.

22 So I think for that reason, that he should be
23 accountable as Maxine for the same reason as she receives it, she
24 lives with him. She knows he is able to work. She is willing to
25 have him work under her name. So I think for that reason, for

1 the entire period of time, the Pochmaras should be held
2 accountable and that would be the \$428,000 figure.

3 MR. KOELZER: Your Honor, can I address that?

4 First of all, to get -- I'm looking at Government's
5 Exhibit Z which is the total which comes out to four hundred
6 twenty-eight thousand plus. The only way for the government to
7 get over four hundred thousand, even accounting for the -- if --
8 if we use the amounts right up to the date of the plea, the only
9 way to get over four hundred thousand which is included in this
10 chart is to go backwards from the date that the conspiracy
11 started, was January of 1998, and the date that the payments
12 started, was about November of 1991. So the government is
13 trying to include approximately seven years worth of disability
14 payments that my client received before the conspiracy even
15 started.

16 I would suggest the government would have to -- I
17 suppose the government could have tried to charge something else.
18 It wouldn't even be the same charge. But I think the government
19 is overreaching here by trying to go all the way back to 1991, to
20 the first disability payment in order to ratchet it up over four
21 hundred thousand.

22 I wanted to point out one thing for the Court and it's
23 Page 513 and 514 of the discovery.

24 THE COURT: And I'm sure we have the information in the
25 report but what would be -- the inception date of their

1 participation with the NAPA Store was in?

2 MR. KOELZER: January of '98 is alleged in the
3 indictment.

4 THE COURT: Okay.

5 MR. KOELZER: But, your Honor, I do have one thing that
6 I wanted to present and I have -- I guess I would like to just
7 read. It's Grand Jury testimony. I can point out the page, it's
8 about eight lines long. It's the testimony of Agent Jeffrey
9 Hackett on April 27, 2011. It's Page No. 513 and 514 in the
10 discovery. A grand juror asks:

11 "Is this just an issue of not reporting income or
12 is it also that he was certified as disabled but
13 currently working? Is it both or just about not
14 reporting income?"

15 The witness, Mr. Hackett says:

16 "Are you asking if we're questioning his actual
17 disability?"

18 The grand juror says: "Yes."

19 Mr. Hackett says:

20 "No, we're not questioning the disability, just
21 the income."

22 So the whole theory of the case is, that he is failing
23 to report his income while he is receiving disability. That
24 occurs from -- his income starts in or about January of 1998 and
25 even if we go all the way up to the present, that would cover an

1 amount approximately three hundred twenty some odd thousand. I
2 think it's overreaching to go any farther back than that and I
3 don't think the government can get over that threshold.

4 THE COURT: Do you agree with the gentleman?

5 MS. PARKER: No, your Honor.

6 First of all, I think that taking Mr. Hackett's Grand
7 Jury testimony out of context, at that point, we weren't going to
8 be engaging in a -- you know, proofs of his status regarding his
9 medical condition and getting into a medical battle but rather,
10 for the time period that he was working at the NAPA Auto Store,
11 he was working and he wasn't reporting it, and that's the essence
12 of the crime.

13 But for purposes of sentencing, the defendant has the --
14 I think, the obligation as we've shown through the proofs, to
15 report any change in condition. He never reports a change in
16 condition.

17 He's obviously able to work and therefore, I think it
18 makes the collection of the payments back to the initial payments
19 to be fraudulent and particularly, I would submit, after the
20 point that he stops working at the NAPA Store, he doesn't stop
21 there because of a change in his condition. He stops working
22 there because of the investigation and he keeps taking the money.

23 And I think, again, that demonstrates that his
24 collection of the money was part of a fraud scheme and it's
25 all -- if not specifically -- I mean, every year, he is making a

1 false representation so I think that could be -- could have been
2 charged.

3 We just didn't go back to the beginning of time because
4 he wasn't particularly working then but I think in hindsight,
5 based on all we've seen, we know that he could have been. And at
6 least we don't see any report of change in condition by him. If
7 he said, I'm a little better but I still can't come back to work
8 on the railroad, we'd be in a different position. But we are not
9 there. We have him saying no change or worsening.

10 THE COURT: If I do accept your position and I think --
11 which is that commencing in November of '91, there is a
12 determination made by the Railroad Retirement Board, perhaps
13 based on information that was available to them only through the
14 recipient, that he nevertheless qualified for the disability
15 payments, it's just in January of 1998 that he substantiates the
16 fact that the full amount of the benefit was something probably
17 he was not entitled to.

18 MS. PARKER: Absolutely.

19 THE COURT: I don't want to litigate the question nor do
20 I think the guidelines necessarily require us to give attention
21 to his benefit between November of '91 and January of '98, when
22 the operative conduct of failing to disclose his income and his
23 physical ability to generate income occurred so far as this
24 offense was concerned.

25 However, that leaves us with a figure of -- if

1 commencing in January of '98, of \$325,000, through the date of
2 the termination of his employment with the parts store, is that
3 accurate?

4 MR. JACOBS: No.

5 MR. KOELZER: No, I don't think so. It's a lower
6 amount. I will let Mr. Jacobs address that.

7 MR. JACOBS: Your Honor, I'm looking at Government's
8 Exhibit Z and that's payments made to Mr. Pochmara. And if we go
9 from December 1st of '98, through the end of that page, through
10 December 1st of 2012, I get a total of \$309,005.

11 I assert to this Court that the cutoff date should be
12 March of 2009, when he ceased employment and that that would be
13 one fourth of the \$23,000 he received in 2009, which is
14 approximately \$5,884. If we take from December 1st, 1998,
15 through December 1st, 2008, and add that \$5,884, we end up with
16 \$231,220. That's the correct number.

17 MR. PIAZZA: And on behalf of Sue Wilson, that's our
18 calculation as well. During the time of the indictment and
19 employment, that Mr. Pochmara received \$231,220.

20 THE COURT: I'm not understanding the reduction from
21 your explanation between the 309 to the 231. Do you know what
22 their --

23 MR. JACOBS: The Exhibit Z, your Honor, goes from
24 December -- well, at least for me to get the 309, I go from
25 December 1st of 1998 through December 1st of 2012. The

1 conspiracy ended in March of 2009. Mr. Pochmara is no longer in
2 the store. He is no longer receiving monies from my -- my
3 clients or Maxine Pochmara is no longer receiving monies and
4 that's why I end up in March of 2009, to answer the Court's
5 question.

6 THE COURT: And with that concluding at two hundred
7 thirty-one thousand, two --

8 MR. JACOBS: Two twenty, the amount of monies that were
9 paid to Maxine Pochmara, allegedly -- well, not allegedly. The
10 jury found that Mr. Pochmara was the employee.

11 THE COURT: Yes. And the government's accepting that
12 or --

13 MS. PARKER: I'm not. I just haven't had -- I'm not
14 going to agree to -- I don't do the math in my head well enough
15 to agree or disagree, frankly, your Honor, and I don't think
16 that's an appropriate basis because as I indicated, I think it's
17 relevant conduct. The defendant manifestly was able to work and
18 continued to report, even after he terminated his employment with
19 the NAPA Store, that he was unable to work.

20 THE COURT: And that part I agree with you, with respect
21 to the Pochmaras. I'm focused right now solely with respect to
22 the Wilsons.

23 MS. PARKER: All right. I would need to have a few
24 moments with an adding machine with a tape to make sure the
25 numbers are right. I just --

1 THE COURT: All right.

2 MS. PARKER: I'm not going to do it off the top of my
3 head.

4 THE COURT: With respect to the Pochmaras, let's see if
5 we can work our way back through the numbers. I'm in agreement
6 that both the restitution amount and the amount of the loss
7 ought to be the total amount received beginning after January of
8 1998.

9 Do we know what those numbers ultimately culminate at?

10 MR. RUPP: Your Honor, if I may, Government's Exhibit 26
11 from the trial is a spreadsheet that details and totals payments
12 from January of '98 through April of 2013, and reflects a total
13 amount paid of \$323,500.25.

14 THE COURT: All right. I want to make sure the
15 government has a chance to review the calculations. However,
16 relevant to our determination here with respect, excuse me, to
17 the amount of loss, is whether or not the amount exceeds four
18 hundred thousand.

19 The additional arguments that are left for attention to
20 is the argument that in addition to the railroad benefit, we
21 should also include the amount of the Social Security benefit
22 that Maxine received but that Bob should have.

23 The pre-sentence report had reflected the fact that
24 Maxine's employer had some unique arrangement, it was like a
25 401(a) account, that permitted an election to treat the Social

1 Security contributions as applying to a -- at least as regarding
2 old age benefits, the equivalent of a retirement benefit.

3 Did we learn anything more about that at all, Mr. Rupp,
4 from the employer?

5 MR. RUPP: Yes, your Honor. I was able to get a hold of
6 and spoke with the human resources director and I'm just trying
7 to find my notes here from that conversation.

8 The gist of it was that at the relevant time period and
9 I want to say it was in the late '90s, Community Mental Health
10 was designated or became an agency as that term is used, as -- in
11 a technical fashion or as a term of art.

12 When they did that, under the tax code, they had the
13 opportunity to use this alternative to Social Security. It was
14 put to a vote with all of the employees. The majority ruled --
15 was just that, majority ruled. Whether you voted for or against
16 it, if it was approved, everybody participated in it. And
17 payments were pulled from paychecks and put into an
18 individualized account for each employee under a larger mutual
19 fund. So monies that were pulled from Maxine's earnings and put
20 into a -- into the account or accounts, were earmarked for
21 Maxine, added to a big general fund where people pulled from
22 after they retire.

23 THE COURT: So it would work somewhat equivalent to a
24 contributory account like a 401(k) or an IRA.

25 MR. RUPP: Correct. And if I had the numbers and

1 letters right, I believe -- I believe it was a 401(a) account
2 that was set up -- or accounts.

3 THE COURT: The advantage -- the advantage of defined
4 benefit plans is that you receive money no matter how long you
5 live, monthly payments. The disadvantage, if you die
6 prematurely, is that you don't necessarily get everything that
7 you've paid into the account. The advantage of a contributory
8 plan on the other hand is that you have an asset, as you put it,
9 an account that is individualized to her.

10 What is the economic value of the account she has with
11 her former employer?

12 MR. RUPP: Are you asking what is its value today?

13 THE COURT: Yes.

14 MR. RUPP: Zero.

15 THE COURT: And the reason for that is?

16 MR. RUPP: There was several -- there was more than one
17 account and she cashed all of those out. The largest portion of
18 the haul from cashing those out was the thirty-some thousand
19 dollars paid back to Community Mental Health to reimburse for the
20 excess medical insurance premiums that were given to Robert as
21 her spouse when he was not legally her spouse. The remaining
22 funds were used to pay towards other medical bills, I believe
23 towards a truck, and without referring to my written submissions,
24 I think there was a third item in particular but it's -- it's
25 escaping me at the moment.

1 THE COURT: So she used the funds to pay -- pay off a
2 personal liability.

3 MR. RUPP: Correct.

4 THE COURT: Okay. I thought that was a separate
5 retirement account. Was it solely the 401(a)? There was no
6 additional 401(k) or equivalent retirement account?

7 MR. RUPP: Not that I'm aware of, your Honor.

8 THE COURT: Okay. In any event, we know what the
9 economic value of that account was. She used about thirty-eight
10 thousand and I'm pretty sure that the figure on that account was
11 included.

12 MR. RUPP: I believe the numbers are in one of my
13 written submissions to the Court. The numbers that are sticking
14 out in my head is that the total value of the accounts left
15 untouched at the time was fifty-some thousand dollars, that there
16 were losses attributable to taxes for early withdrawal.

17 THE COURT: Roughly fifty-four thousand?

18 MR. RUPP: I won't disagree.

19 THE COURT: If we double check our numbers.
20 Interestingly enough, Miss Parker, the estimate that we had from
21 the Social Security Administration was in the range of
22 seventy-six thousand. Now, you haven't convinced the defendants
23 yet that we ought to be including that Social Security number.
24 But even if we do, in my reviewing the Social Security
25 calculations, they came in at \$74,500, but none of that is

1 reduced to present value. And when I did a quick present
2 calculation, I ended up with about fifty-five thousand, which
3 would be roughly equal to the principal amount in the 401(a).

4 MS. PARKER: What was that number again, judge?
5 Approximately.

6 THE COURT: I ended up with a present value of
7 fifty-five thousand. And the 401(a) value, Mr. Rupp indicated
8 was around fifty-four thousand. I know he's got it in his
9 papers. I just don't have it immediately at hand.

10 Were you able to locate it, sir, just to verify?

11 MR. RUPP: No, not yet, your Honor.

12 MS. PARKER: Your Honor, were you looking for where the
13 \$52,000 went?

14 THE COURT: Nope, just trying to verify what the amount
15 was in the 401(a). Because it places a value on the Social
16 Security or its equivalent benefit.

17 MS. PARKER: The only thing we have on that, that I'm
18 aware of, is the Exhibit C, which says where the three different
19 account balances were -- how they would be applied. Is that what
20 you're referring to?

21 MR. RUPP: That's -- that's what I would have been
22 referring to as well, your Honor, and I don't have the exact, to
23 the penny calculation, but just a quick look at it, puts it right
24 at about fifty-four thousand.

25 THE COURT: Okay. Now, I want to make sure the

1 government has a chance to double check the figures but in any
2 event, I see it less than four hundred thousand, even if we
3 utilize the Social Security or 401 benefit -- 401(a).

4 MS. PARKER: I'm sorry?

5 THE COURT: I see it as being below four hundred
6 thousand.

7 MS. PARKER: As to which defendants?

8 THE COURT: Both. Because I think we're appropriately
9 at two hundred thirty-one thousand and change with respect to the
10 Wilsons and at three hundred twenty-three thousand five hundred,
11 with respect to the Pochmaras. And so then if I add the
12 fifty-four thousand to the three twenty-three, it's still under
13 four hundred.

14 MS. PARKER: Well, your Honor, I would submit that I
15 don't disagree as to the Wilsons. As to Robert Pochmara, I think
16 it's important that we get -- and Maxine, we get the number right
17 and I don't submit that the three twenty-three is correct. The
18 exhibit was prepared in anticipation of trial and it does not
19 include the payments that were made up to the point of the plea.

20 The Exhibit Z has an additional, if my math is correct,
21 \$2,053.10 and that should also be included which wouldn't change,
22 I agree, the -- the -- I'm sorry, the assessment for loss in
23 terms of guideline scoring, but it does affect the restitution
24 and I want to get that correct.

25 THE COURT: Okay. And I appreciate your point. It is

1 important when it comes to restitution but respectfully, the
2 guideline also gives us some latitude in coming to the conclusion
3 that the technical effort to get at this precisely right, has a
4 point of diminishing returns and says, take your best shot and
5 frankly, I've given it my best shot.

6 For purposes of the amount of loss, I'm comfortable that
7 a range of two hundred thousand to four hundred thousand, is
8 scored correctly, and I will make sure and take you up on that
9 point that you have an opportunity before we get to restitution
10 to assess those numbers. That's a different issue.

11 Next issue, was the propriety of the financial
12 disclosures. The government has taken the position that they
13 have been so inadequate that two points ought to be -- two levels
14 ought to be added for obstruction of justice -- the obstruction
15 of justice enhancement pursuant to 3C1.1.

16 I spent a little bit of time with the papers, including
17 the supplementary papers. I'm fully aware of the arguments with
18 respect to the accuracy of the Pochmaras' numbers. I guess I was
19 still a little bit more focused on the propriety of the Wilsons'
20 financial information.

21 I'm aware of the fact that we have two accounts -- that
22 the Wilsons have two accounts at Chemical Bank as of December the
23 27th that would have, as I understand it, had been roll-overs
24 from the Edward Jones and Lord Abbott funds, in the amount of
25 thirty-five thousand for Sue Wilson, and change. And forty-nine

1 thousand and change, for Gary. Those are not reflected in the
2 disclosures that were made to the probation officer.

3 On the other hand, there was a reference in the
4 pre-sentence report to them being entitled to monthly payments as
5 of a particular date that I think someone concluded was an
6 appropriate disclosure of those contributory accounts.

7 MR. JACOBS: Yes, as to Gary Wilson and the forty-nine,
8 your Honor. Earlier on, in the pre-sentence report, on the same
9 page, it says X amount per month payable at a certain date.
10 That's -- that's our reference to the forty-nine.

11 THE COURT: But he does not disclose the principal
12 amount of the account.

13 MR. JACOBS: That's correct, we didn't have the
14 forty-nine thousand down.

15 THE COURT: It was omitted.

16 MR. JACOBS: And we said he had a pension and asserted
17 that -- that retirement accounts through Chemical Bank which is
18 slated to pay \$750 per month starting on May 25th, 2023.

19 THE COURT: If those are contributory accounts, who
20 selected the date and who selected the amount rather than
21 providing the principal balance of the account as he did in the
22 other situations? Why didn't he disclose the fact that it was
23 almost a \$55,000 principal amount?

24 MR. JACOBS: We would assert it was a harmless error.
25 And when they were asked about pensions and IRAs, they thought

1 the government was asking how much money they would receive at a
2 later date. So that's why they gave the answer they did.

3 THE COURT: Well, with the contributory account, you get
4 to choose, up to the age of 78 and a half, when it's going to
5 begin, how much you're going to take down, so disclosure of the
6 monthly payment is in no way consistent with the disclosure of
7 the asset, as he did with respect to other contributory
8 accounts.

9 Why didn't he do that the same way?

10 MR. JACOBS: Other than to put my client on the stand
11 and have him answer that question, I -- and he would say that --
12 one moment, your Honor.

13 (Whereupon defense counsel and Defendant Gary Wilson
14 confer off the record)

15 MR. JACOBS: My client believes at least in some of the
16 documents that the Probation Department has, and I guess we will
17 ask the probation officer to review them, that they thought they
18 had put down the actual number and also put down that they would
19 receive a payout of a certain amount per month.

20 THE COURT: We will give him a moment on that.

21 MR. JACOBS: Yes.

22 (Whereupon document handed to defense counsel and
23 conversation take place off the record)

24 MR. JACOBS: Just one moment, your Honor.

25 THE COURT: Yes, sir.

1 (Whereupon conversation takes place between defense
2 counsel and Wilson Defendants)

3 MR. JACOBS: Your Honor, I would respond that the
4 documents provided by the Probation Department, that the clients
5 are to fill out, first asked for the type of asset, anticipated
6 assets, and that's where they put their IRA information. And
7 they asked if it's individual or joint and they both list
8 individual. And then the amount received or expected to be
9 received, the client -- my client wrote down \$750 a month as to
10 him. Date expected to receive, May 25th, 2023. From where,
11 Chemical Bank, Rogers City. And they did the same information as
12 to an IRA regarding my client's spouse. They put down the
13 information that was requested on the form.

14 You're asking us to differentiate between a
15 contributory account and non-contributory. They asked him --
16 they asked, how much do you expect to receive, when do you expect
17 to receive it and where you receive it from. And that's what
18 they put down.

19 MR. PIAZZA: And I would suggest, your Honor, on behalf
20 of Sue Wilson, they are not trying to hide anything. At least
21 there is something there that reflects that there is an account.
22 And my client indicates she thought she turned over the documents
23 to the Probation Department but, you know, I will defer to the
24 Probation Department on that.

25 (Whereupon counsel confer off the record)

1 THE COURT: Government's view?

2 MS. PARKER: Well, your Honor, I'm just now getting to
3 look at this form but there is a question, the first item on the
4 form after your name and your Social Security number, is bank
5 accounts: "Include all personal, business, checking and saving
6 accounts, credit unions, money market, certificates of deposit,
7 IRA, keynote accounts, thrift savings, 401(k)," et cetera. It
8 seems to me this clearly comes within the parameters of that
9 request for information and disclosure.

10 After that, it's: "Securities, all stocks and public
11 corporations, businesses," blah, blah, blah. You know, it's --
12 it's an asset that they know they have and they are not listing
13 it anywhere on this form that I can see.

14 THE COURT: Now --

15 MS. PARKER: "All money owed to you by any person or
16 entity." It's certainly their money given and placed in trust
17 with someone else until they decide to take it back.

18 THE COURT: I appreciate your point. They have
19 appropriately disclosed the principal balance of the IRA. They
20 have not disclosed the principal balance of the roll-over 401(k).

21 On the other hand, they have furnished a monthly income
22 amount and they've selected a date that they believe it becomes
23 payable, the amount. You have to run the calculation in order to
24 get there. Somebody had to say, well, the commencement date on
25 this contributory account will be May 25th of 2023, and if we

1 take down the full amount over a period of the beneficiary's
2 lifetime, the monthly amount will be \$750. And that's what we
3 are going to disclose.

4 And unfortunately, it reads like a defined benefit plan
5 which would terminate on the recipient's lifetime rather than
6 disclosing the fact that there is an asset value there.

7 Do we know why?

8 MR. JACOBS: Your Honor, I asked that question to the
9 accountant who was going to help us with the value of the real
10 estate and whether they talked about that and he is present here
11 in the courtroom.

12 And his response to me over the telephone was, I don't
13 know if I gave him that number or if we made a phone call and
14 talked to -- hold on. One moment, your Honor.

15 (Whereupon defense counsel confers with accountant off
16 the record)

17 MR. JACOBS: They received a fax from Chemical Bank is
18 how they got that -- came up with that number, your Honor, and
19 I -- I can put him on the stand if the Court would like that.

20 THE COURT: Sure.

21 MR. JACOBS: May we call him at this time?

22 THE COURT: Mm-hmm.

23 MR. JACOBS: Jerry Kieliszewski. Bring that document
24 with you.

25 THE COURT: Good morning.

1 THE WITNESS: Good morning.

2 THE COURT: Do you solemnly swear that the testimony you
3 are about to provide will be the truth, the whole truth and
4 nothing but the truth so help you God?

5 THE WITNESS: Yes.

6 THE COURT: Please have a seat, sir.

7 JEROME KIELISZEWSKI

8 Having first been duly sworn at 12:30 p.m., testified as follows:

9 MR. JACOBS: Your Honor, I was, with this witness, going
10 to ask him some other questions regarding value and fair market
11 value of the Millersburg cottage and the house. Does the Court
12 want to get into those issues or just --

13 THE COURT: I'm aware of the differences on the
14 valuation questions. I'm at least satisfied that there is an
15 explanation for the difference in valuation.

16 The three issues that I was focused on, particularly
17 with respect to the Wilsons, are the one that we've been talking
18 about, the adequacy of the disclosure of the roll-over 401(k)s.

19 Second, the unexplained income from Northwestern Mutual
20 Life and Hartford Insurance that would have been disclosed in
21 2006. The income from those investments in that one reporting
22 year was \$26,000. Obviously, the principal amount of that
23 investment would have to be substantially greater and I don't
24 know why or what happened with respect to those.

25 The third issue was the 2009 mortgage application. It

1 reflected approximately \$400,000 in investments. I believe
2 that's what it reflected. The explanation that we most recently
3 have is that is a group term life insurance policy with no
4 asset value and a death benefit equivalent to four hundred
5 thousand. And I guess I'm trying to get an understanding if that
6 is the explanation, then the financial report in the PSR is
7 accurate.

8 MR. JACOBS: I would have to put my client on the stand
9 as to the income dealing with Northwestern Mutual and also, my
10 client on the stand as to the mortgage application and the four
11 hundred thousand dollar investment. But this witness will --
12 we'll need just for that one 401(k) issue.

13 THE COURT: We will take his testimony.

14 MR. JACOBS: Thank you.

15 DIRECT EXAMINATION

16 BY MR. JACOBS:

17 Q. Your name, sir?

18 A. Jerome W. Kieliszewski.

19 Q. You're a certified public accountant?

20 A. Yes.

21 Q. How long have you been a certified public accountant?

22 A. Maybe 1978, someplace around there.

23 Q. You run a business?

24 A. Yes.

25 Q. What sort of business?

1 A. I have my own practice operated in Rogers City since
2 probably -- excuse me -- I guess I was certified in 1976 or
3 thereabouts. Operated my office in Rogers City from someplace
4 in '78 until today's present date.

5 Q. You knew -- you know, of course, the Wilsons.

6 A. Yes.

7 Q. And to my understanding, you've helped them at least give
8 some of the information regarding their financial disclosures for
9 the pre-sentence report, is that --

10 A. That's correct, yes.

11 Q. -- fair to say? All right. And you've been sitting here in
12 the courtroom so you've heard the discussion and we're asking
13 specifically about a 401(k) or pension that Gary had. And he
14 listed it in his pre-sentence report as a -- as an asset that
15 would pay him --

16 A. Seven hundred fifty -- well --

17 Q. -- \$750 per month starting May 25th of 2023. Any idea how
18 they came to --

19 A. First of all, those are not -- those are what are called
20 individual retirement accounts. They have been rolled into
21 individual retirement accounts at Chemical Bank. The amounts of
22 money, I think, is an aggregate based on the future value from
23 today's date to when they expect to retire. And I think that was
24 in 19 -- I mean 2023 at age 65. So we are giving some present
25 value weighting to that \$750 number and it is both their

1 pensions -- or excuse me -- both their IRAs that add up to that
2 balance.

3 As of today's date or the date that I received from
4 Chemical Bank, we had talked to Mary Guest several times.

5 Q. Who is Mary Guest?

6 A. Mary Jo Guest is the investment officer at the Chemical Bank
7 office in Rogers City. She is also the branch manager. And she
8 basically had given us some numbers over the -- over the phone as
9 to what we could expect to receive based on the estimation of
10 what the value would be.

11 Some of the investment is held in an annuity situation.
12 Some of it is in what's called stocks, bonds, mutual fund
13 activities. So, you know, those are subject to increase,
14 decrease. Annuity has some value like that but we just kind of
15 used a representative value. If everything works hopefully the
16 way it should given time value money, the joint value of that
17 pension distribution was going to be \$750.

18 As -- if it was to be done today, the valuation or the
19 distribution -- or excuse me, it would be substantially less.
20 You know, she just came up with some numbers here, saying that if
21 Gary was 70 1/2 today, his required minimal distribution on the
22 one IRA was thirty-eight bucks. Sue's was \$64. And the
23 annuities at age 65 was two sixty-five for Gary and Sue was one
24 sixty-five. If I add those up, it comes up to \$532. So the \$750
25 was actually giving some weighted value to hopeful performance of

1 those funds.

2 Q. And you're saying that \$750 is referring to one IRA that
3 back in --

4 A. It refers to the whole --

5 Q. Hang on -- back in 2010, had a value of around forty-nine
6 thousand?

7 A. Possibly yes. Yes.

8 Q. And the second one was Sue's IRA?

9 MS. PARKER: Your Honor, I will object to the leading.

10 BY MR. JACOBS:

11 Q. Okay. Regarding IRAs, do you know specifically how much in
12 the IRAs?

13 A. I would anticipate that those amounts were someplace around
14 that \$49,000 number and the \$30,000. I thought between the two
15 of them, their value is under \$80,000.

16 MR. JACOBS: I have no further questions for this
17 witness, your Honor.

18 THE COURT: Cross?

19 MS. PARKER: May I see the exhibit, your Honor?

20 MR. JACOBS: Oh, sorry.

21 MS. PARKER: Is it going to be an exhibit?

22 MR. JACOBS: You can have it if you want.

23 THE COURT: Anybody have a spare?

24 MS. PARKER: I'm sorry?

25 THE COURT: Does anyone have a spare?

1 MR. JACOBS: No, sir. It was just brought with him. I
2 hadn't seen it prior to today.

3 MS. PARKER: Why don't I let the Court look at this one
4 because I thought the witness was being called to testify as to
5 what was in the account and I don't see anything that answers
6 that question.

7 I do see that the fax was received October 31, 2013,
8 which is after the reporting was made to the probation officer.
9 I'm not sure of the date but I would assume that was in June that
10 you received financial information, Mr. Burns?

11 MR. BURNS: I received their financial documents on May
12 31st, 2013.

13 MS. PARKER: All right.

14 THE WITNESS: Can I offer an explanation?

15 MS. PARKER: Your Honor, I don't want to hear testimony
16 from somebody who is relying on something that he doesn't have
17 information on. And that's essentially where we are. This is
18 not an account that he has a statement for.

19 There should be and I assume the defendant should be
20 held responsible for, instead of providing this sort of
21 information, an account statement that says this is what's in the
22 account. That's a very simple thing. But we're going a long way
23 to avoid that. And I object.

24 THE COURT: I have a couple of questions for the
25 gentleman.

1 THE WITNESS: I could offer some questions -- or
2 observations. If I'm not mistaken, I think there was a question
3 in regards to the transfer of those accounts from Edward Jones to
4 the Independent Bank and I think the questions raised by the
5 prosecution was there was an \$80 difference. So the numbers were
6 known because that's where they came from. It came from a
7 cancellation from one IRA, transferred to another financial
8 institution. So the numbers are in the records someplace because
9 there was a question.

10 As to the timing of that fax, we had prepared that by
11 Sue simply in the form of by telephone, we said, okay, we are
12 answering this question on this page. And it asked for an amount
13 of expected benefits and we answered that question by a phone
14 call. Then, we have the rebuttal of the prosecution challenging
15 some things. So I said, okay, I guess we better get some
16 documentation at which point in time, I questioned Mary Jo at the
17 bank and then she faxed me that information.

18 So that's what I have. I think we've overstated the
19 benefits to them in the future so we are not lying. As to the
20 known valuation of the IRA, from my memory of reading some of the
21 questions and that we were trying to hopefully find answers for,
22 the prosecution or the government already knew about those
23 dollars.

24 Am I not correct?

25 THE COURT: I think that the relevant question is the

1 point in time.

2 A couple of quick questions. As I understand it, and
3 was this consistent with your understanding, that these would be
4 roll-over IRAs, initially reflecting the Edward Jones and Lord
5 Abbott funds that were maintained through a different investment
6 service?

7 THE WITNESS: That is correct.

8 THE COURT: They must have a separate IRA with -- that
9 had a principal balance on May 25th, 2023, a principal balance of
10 \$3,075. That's included in the pre-sentence report, the
11 principal amount.

12 THE WITNESS: They -- they probably have several
13 accounts. Now, if you notice the way she registers that, they
14 are all IRAs. The fact is, some might be held in the form of a
15 mutual fund, some might be held in the form of an annuity. They
16 are all IRAs. So at that point in time, you know, to state that
17 one is an IRA and one is something else, that's incorrect. They
18 are all housed inside the corpus of an IRA and they are just held
19 in different formats of investment.

20 THE COURT: And the IRA with the principal balance of
21 \$3,075 is disclosed.

22 THE WITNESS: Is disclosed and may represent -- and at
23 that point in time, I do not have the answer as to exactly what
24 it is but it is probably some form of a mutual fund of some kind
25 that the bank uses and it says that balance is \$3,000.

1 THE COURT: That is the manner in which those funds
2 within the IRA are invested.

3 THE WITNESS: That would be correct.

4 THE COURT: Okay. Now, our understanding is that there
5 are two IRAs, one held in Sue's name, one held in Gary's name, at
6 Chemical Bank with a principal balance on September 27th of
7 2013 -- in Sue's name with a principal balance of \$35,487 and
8 change and in Gary's name of \$49,415 and change.

9 THE WITNESS: That sounds correct.

10 THE COURT: Why or who was responsible for reporting the
11 economic value of those accounts of roughly \$85,000 as an
12 account, quote, "Slated to pay out \$750 per month starting May
13 25th of 2023"?

14 THE WITNESS: I think probably Sue had the problem with
15 that part of that disclosure form and so she asked me the
16 question. I asked the bank the question and we came up with an
17 answer and we put it on the page. It's not trying to be
18 deceptive. You know, we probably didn't -- I didn't review the
19 whole statement that was prepared. I just helped them with
20 certain portions of it. So at that point in time, the question
21 remains significantly, I think everybody knew those assets were
22 there. It's just the mis -- it's just an error in preparation.
23 A simple error in preparation.

24 THE COURT: Well, I read the pre-sentence report and I
25 had concluded from that statement that he was entitled to a

1 pension benefit with a monthly payment, that would be exhausted
2 or available throughout the course of his lifetime.

3 THE WITNESS: And the mis -- the use of nomenclature
4 that is an IRA pension or isn't it a pension? Technically, it's
5 an individual retirement account. We think -- everybody that's
6 self-employed, we think that's our pension.

7 THE COURT: Well, I appreciate that, but let's assume
8 for purposes of discussion, that at six months after the
9 commencement date of the payment, if it was a defined benefit
10 plan, he passes away. The \$750 payment would be gone if it was a
11 defined benefit plan.

12 THE WITNESS: Yes and no, depends on the selection
13 process of the payouts. Because we always have, when going
14 through a retirement situation, which it is a qualified pension
15 plan, there are benefits that are allocated to payouts based on a
16 selection process, a hundred percent to me or fifty percent to
17 me, fifty percent to my wife or some appropriate percentage
18 differentials, 75, two-thirds. There is normally on a defined
19 contribution plan, you have to consider spousal rights.

20 THE COURT: Mm-hmm.

21 THE WITNESS: And so in this situation, we don't have
22 that. He has never had that. It is not a pension. It is an
23 individual retirement account.

24 THE COURT: Indeed. And that is exactly what I didn't
25 know in reading that sentence.

1 THE WITNESS: Right. So at that point in time --

2 THE COURT: That's not -- I have a question. That
3 sentence would reflect a disclosure of a defined benefit pension
4 that would have a termination date, either coinciding with the
5 beneficiary or a co-beneficiary, with no residual economic value.
6 But that wasn't the case, was it? It was an IRA with a market
7 value combined in excess of \$85,000.

8 True?

9 THE WITNESS: I would -- yes.

10 THE COURT: Okay. And whose decision was it to decide
11 to reflect it as a monthly payment amount as opposed to the
12 principal value as was disclosed with respect to the other IRA?

13 Who chose to do that?

14 THE WITNESS: I'm not sure that anyone really -- I think
15 they were just answering questions on pages as they unfolded in
16 the probation report and when they came to it, that's where the
17 question was and that's where they answered it. Now, they are
18 related -- they're related, so I guess at that point in time, we
19 missed -- we missed the dollar value on the front page but we
20 overstated the valuation on whatever page that was.

21 THE COURT: Now, to be clear, just -- you had to
22 consider a belief that it might have been possible that both
23 monthly benefit of \$750 a month, and the principal balance of
24 approximately \$85,000 may have been both furnished to the
25 probation officer and he merely accidentally picked up just the

1 income amount.

2 Is the \$85,000 combined total amount of the IRAs
3 included anywhere in that report?

4 MR. JACOBS: We believe we gave Mr. Burns some Lincoln
5 Financial documents that actually have that information in it,
6 your Honor, so we are going to have to do a peek.

7 On the instructions for completing the net worth, the
8 Court has already heard our response and that is, it was listed
9 not under bank accounts, CDs, IRAs, 401(k)s. Instead, it was
10 listed under anticipated assets as X amount a month, although
11 they actually wrote in IRA on the documents.

12 THE WITNESS: I would offer maybe one other piece of
13 information. Most of us understand the use of an IRA. The fact
14 that there is a qualification of when you can take it, when you
15 can't take it without penalty. And I think probably their
16 understanding of what they are trying to portray on the form was
17 the fact that --

18 MS. PARKER: Objection, your Honor.

19 THE WITNESS: -- it's not mine until later.

20 MS. PARKER: I don't think he can speak to supposedly
21 their state of mind. If they are not going to take the stand,
22 I'm going to object.

23 THE COURT: I would like to get the gentleman's
24 statement, if you would like to complete that, sir. If you would
25 like to complete your statement, please.

1 THE WITNESS: You know, we know that there is dates when
2 we can take the IRA without penalty and people just look at it
3 from that standpoint. It's a sacred thing. You take that money
4 after you retire and for a person that's self-employed, we've got
5 to provide everything for ourselves. No one -- no one is
6 helping.

7 So I think that might be the reason why, in their mind,
8 it's on that page versus on the front page because it isn't
9 something that we have available for our use right now or don't
10 want to make it available for our use right now unless there is a
11 very compelling reason to do so.

12 THE COURT: And I appreciate your point. The only
13 question that I have is that the principal value of the small IRA
14 account was disclosed. They just chose a different method of
15 reporting it --

16 THE WITNESS: The annuity side.

17 THE COURT: -- for the larger accounts.

18 THE WITNESS: Right. Because if you look at it, one is
19 an annuity and one is an IRA and most people don't understand the
20 use of one versus the other.

21 THE COURT: Only a portion of the larger accounts were
22 invested in annuities.

23 THE WITNESS: Correct.

24 THE COURT: Not all.

25 THE WITNESS: Not all of them. Looks like even Mary Jo

1 on the -- on that thing there, defines them differently. It
2 looks like there is a basket of at least four or five different
3 investments.

4 THE COURT: Indeed. I'm completed with this witness
5 unless you have any additional questions for the gentleman?

6 MR. JACOBS: I don't have any, your Honor.

7 THE COURT: And I just wanted to verify one way or the
8 other if you are correct or if your client's understanding that
9 the principal balance of this account was disclosed in addition
10 to the payment amount. Was it the \$85,000 or just the \$750 a
11 month?

12 (Whereupon defense counsel and defendants confer off the
13 record)

14 MR. JACOBS: I will be putting my client on the stand
15 and I guess I will let Mr. Piazza answer because Miss Wilson did
16 a lot of the financial information and she -- she believes she
17 gave Mr. Burns the actual documents but Mr. Burns informs me he
18 has nothing from Lincoln Financial in his possession. He does
19 have a lot of other documents and I will refer to Mr. Piazza as
20 to this, your Honor.

21 MR. PIAZZA: The only thing I can indicate is that my
22 client indicates she did disclose various documents. She thought
23 those were included. So that's the only thing I can add.

24 THE COURT: We can verify that. Does anyone else have
25 any questions of the gentleman on the stand?

1 MR. JACOBS: No, sir.

2 MR. PIAZZA: I don't have any other questions
3 understanding the Court gave us the three issues that the Court
4 is inquiring about.

5 THE COURT: Yes, sir.

6 MR. PIAZZA: Okay.

7 THE COURT: Thank you, sir. I appreciate it.

8 (At 12:52 p.m. - witness excused)

9 THE COURT: I think we are in a position where we will
10 give you an opportunity to verify the records that the probation
11 officer has just to see if, in addition to the disclosure of the
12 annuitized amount of \$750 a month, there was also a disclosure of
13 the approximate \$85,000 principal balance of the IRAs.

14 Next question related to two 2006 payments that were
15 reflected in income of \$10,406 and \$10,000 from two investments,
16 Northwest Mutual Life and one was Hartford Insurance.

17 MR. JACOBS: We will have to put you on the stand for
18 that. I'm going to have to put Mr. Wilson on the stand to answer
19 that question for your Honor.

20 THE COURT: Certainly.

21 MR. JACOBS: I would recall Gary Wilson.

22 THE COURT: Good afternoon.

23 THE WITNESS: Good afternoon, your Honor.

24 THE COURT: You remain under oath. If you would just
25 like to have a seat please.

1 THE WITNESS: Thank you.

2 GARY WILSON

3 Having previously been sworn by the Court, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. JACOBS:

6 Q. Mr. Wilson, we're asking you certain questions as directed
7 by the Court. I don't want you to go off in another direction on
8 me, all right?

9 A. I'm here.

10 Q. Okay, thanks. We're asking specifically about Northwestern,
11 I think it was, Insurance. Northwestern and Mutual, a total of
12 about \$26,000, monies that you had received in the past from
13 them. Is that fair to say?

14 A. Yes.

15 Q. One was a little over ten, the other was a little over
16 eleven, is that --

17 A. Yes.

18 Q. All right. When -- do you recall when you got that money?

19 A. We cashed those in after -- one was after Gary's graduation
20 for his college fund and the other one, I believe, was for Keri's
21 graduation, college fund. Mark Ferguson was handling those
22 accounts at that time.

23 Q. Was it the total amount of monies in the account?

24 A. Those two accounts, Mark Ferguson set up for their college
25 funds.

1 Q. All right. So when you like drew the money out of
2 Northwestern, did you draw all that was in the account out? If
3 you recall.

4 A. I can't remember that, Steve. I can't sit here and honestly
5 answer that question.

6 Q. All right. You've also heard and we've looked at this
7 Uniform Residential Loan Application, Government's Exhibit A, and
8 you've heard talk about you all having \$400,000 in investments.

9 Did you ever have \$400,000 in investments?

10 A. No.

11 Q. All right. Document does say life insurance, net cash
12 value, four hundred thousand, face amount, four hundred thousand.
13 It does say that, doesn't it?

14 A. Everybody can make a mistake. I believe maybe my wife wrote
15 that down wrong.

16 Q. Well, first of all, yes, it does -- it does essentially say
17 that?

18 MS. PARKER: Objection, your Honor. Why don't we just
19 let Mr. Jacobs take the stand and he can ask the questions and
20 answer them himself.

21 MR. JACOBS: I can do that and that would be fine, your
22 Honor. I would much rather do it that way.

23 THE COURT: Let's -- let's see if Mr. Wilson can furnish
24 the responses and then he can corroborate that with you.

25 MR. JACOBS: Okay.

1 BY MR. JACOBS:

2 Q. Mr. Wilson, since we've been to court, we've talked about
3 this loan application.

4 A. Yes.

5 Q. It says four hundred thousand dollar face value life
6 insurance, is that correct?

7 A. Only if I'm dead.

8 Q. Only if you're dead. So it isn't a net surrender cash
9 value?

10 A. No, it is not.

11 Q. All right. What type of policy is it?

12 A. Term life, only if I'm dead.

13 MR. JACOBS: I believe I've asked about what the Court
14 inquired about. I will let -- Miss Parker may have questions for
15 you.

16 MR. PIAZZA: I have no additional questions on behalf of
17 Sue Wilson and I will incorporate his answers.

18 THE COURT: Miss Parker, do you have any questions for
19 the gentleman?

20 MS. PARKER: Yes, your Honor.

21 CROSS-EXAMINATION

22 BY MS. PARKER:

23 Q. Maybe I missed something but when you got a 1099 in 2006 or
24 the two 1099s reflecting approximately \$26,000 in interest, how
25 much was in those accounts that gave rise to that?

1 A. You would have to ask my accountant. I cannot sit here and
2 answer that, I'm sorry.

3 Q. Well, you had an opportunity to be aware that that was a
4 question, right?

5 A. Ask that question again.

6 Q. That was one of the questions that the Court asked you to
7 answer prior to sentencing.

8 A. Which was?

9 Q. To explain what was in that account at that time and then
10 where the money went from there.

11 A. And this is saying I've got how many thousands of dollars in
12 there?

13 Q. Approximately \$26,000 in interest. The 1099 of past year
14 tax returns reflecting between the two accounts is approximately
15 \$26,000 in interest income. Now, the judge can do present value
16 calculations. I don't do those very well. But there has to be a
17 calculation as to what the interest rate was and how much
18 principal was there to generate that much income and you would
19 have had a statement reflecting that.

20 A. I would have to say if there was taxes filed in that year
21 and I had my accountant do my taxes, he would be the only person
22 that is going to be able to answer that question because --

23 Q. No. That's --

24 A. -- he did my taxes. I don't know numbers, I'm sorry.

25 Q. All right. Will you listen to my question?

1 A. I'm listening.

2 Q. You would have given your accountant the 1099 which said
3 what your interest income was because that would be reportable on
4 your tax return. You do not, as far as I understand, need to
5 give him the statement that says anything about the value of the
6 account that caused that 1099 to be issued. That's the Court's
7 question and it's my question.

8 What was in the account or the two accounts that gave
9 rise to those two 1099s? The statements would have been mailed
10 to you.

11 A. I'm sorry. I would have took those right straight to my
12 accountant. I just -- I can't answer that. I cannot answer that
13 because I do not do that. That's why I hire an accountant. I do
14 not know.

15 Q. Well, you were instructed by the Court in an order on
16 October 10th, two months ago now, to find out. What have you
17 done to find out?

18 A. You'll have to ask my attorney. I -- I don't know.

19 THE COURT: Miss Parker, I have to take about four to
20 five minutes off to address a Grand Jury question.

21 My presumption in originally looking at these materials
22 that those were probably two whole life policies that they
23 probably cashed in at the time that they needed to raise the cash
24 to help their kids in college.

25 The tax treatment of the proceeds wouldn't necessarily

1 reflect just interest. Any time that those policies are
2 surrendered, there would be tax, as I recall, on the present
3 value of the policy at the time and I'm not sure whether that
4 would be accurate in this situation or not.

5 We can take up that question here in a couple of
6 minutes. I will be back in about five minutes and we will go
7 from there. That will also provide you an opportunity to verify
8 some of the financial information and the calculations on the
9 loss.

10 We will continue until two at that point. The record is
11 closed.

12 MR. JACOBS: We will be stopping at two, your Honor?

13 THE COURT: Yes, sir.

14 MR. JACOBS: Yes, sir.

15 (At 1:02 p.m. - proceedings recessed)

16 (At 1:24 p.m. - proceedings resumed)

17 THE COURT: We were in the process of addressing -- we
18 had two remaining items that we were giving attention to. The
19 first of which was the reporting on the '06 tax return of the
20 Northwestern Mutual Life and Hartford Insurance, trying to get an
21 understanding for what those transactions were.

22 Have you had -- and when I left the courtroom, it
23 appeared as though, Mr. Wilson, who at the time was on the stand,
24 was also attempting to communicate to the accountant who was
25 standing in the back of the courtroom.

1 MR. JACOBS: They were -- they wanted to communicate to
2 me what the Court put on the record, that they were cashing in an
3 investment and that money was taxable money from an investment.

4 THE COURT: Were they life insurance policies or some
5 other investment deal?

6 MR. JACOBS: I don't know. Do we know? Do you know,
7 Jerry?

8 THE ACCOUNTANT: Judging from the name of the company,
9 Northwestern Life, I would assume it's a life insurance policy.

10 MR. JACOBS: Assumption that it's a life insurance
11 policy, your Honor.

12 THE COURT: That was my assumption.

13 MS. PARKER: May I just interpose an objection? I think
14 you know the nature of it.

15 THE COURT: I do. On the other hand, I had the same
16 assumption as the gentleman. Which --

17 THE ACCOUNTANT: Looks like a duck, quacks like a duck.

18 THE COURT: The only remaining question related to the
19 disclosures concerning the earlier four hundred thousand dollar
20 investment that had been reported on the '09 mortgage
21 application.

22 Did you have any additional questions of Mr. Wilson on
23 that? We had not completed it.

24 MS. PARKER: Well, I had a question and I believe as a
25 related one, the mortgage application says \$400,000 in life

1 insurance cash value but below that, it says net worth of
2 businesses owned, \$436,000, and that's not included in the
3 disclosure statement. And that was another aspect of that that I
4 wanted to explore.

5 THE COURT: We will recall Mr. Wilson and give you an
6 opportunity to complete the examination on that point.

7 Mr. Wilson?

8 MR. JACOBS: Gary, back up.

9 THE WITNESS: Sworn in?

10 THE COURT: Still -- you still remain under oath, sir.

11 THE WITNESS: Okay.

12 MR. JACOBS: Your Honor, I would object to this line of
13 questioning. It wasn't an issue that had been brought up in
14 prior -- before. It wasn't listed as an objection by Miss Parker
15 to address the value of the business.

16 MS. PARKER: It was listed in my response. I will
17 give you the page number if you would like, that it was not
18 included.

19 THE COURT: It's there. If you would like to continue.

20 MS. PARKER: I'm sorry? Proceed? Yes, sir.

21 THE COURT: Proceed with your witness.

22 MS. PARKER: All right.

23 CROSS-EXAMINATION (Continued)

24 BY MS. PARKER:

25 Q. Mr. Wilson, in the mortgage application that you did in, I

1 believe, April of 2009, you indicated that your net worth of your
2 business was \$436,000 -- excuse me, \$436,115.32.

3 A. Is that a resale value, a net value, appraised value? What
4 kind of value was it?

5 Q. You filled it out. I did not. Is that number --

6 A. That ain't my writing. I didn't fill that out but --

7 Q. All right. Did you sign it?

8 A. I don't --

9 Q. I'm referring to Government's Exhibit A.

10 A. That's my signature, yes.

11 Q. At Page 3. And at Page 4, it says you understand
12 essentially that you're obligated to tell the truth.

13 A. I signed that.

14 Q. All right.

15 A. I didn't read it but I signed it.

16 Q. Okay. And you're applying for a mortgage, correct?

17 A. That would -- is that a business mortgage? Business or
18 house?

19 Q. It's a refinance.

20 A. For what?

21 Q. Take a look. It's yours. Take a look.

22 A. And I have to get my binoculars out. And what date was this
23 on?

24 Q. Well, we will go back to Page 4.

25 A. '09.

1 Q. Do you see here, purpose of loan? On Page 1?

2 A. Lower rate. It was maybe a mortgage of an existing
3 mortgage?

4 Q. I'm not --

5 A. Yes.

6 Q. I'm not answering your questions. I'm asking the question.

7 A. Yes. To the best of my knowledge, that is a refinancing of
8 an existing mortgage and I may have added more money to that
9 mortgage to come up with that number.

10 Q. Okay. My question is, on that day, did you report that the
11 value of your business was \$436,115.32?

12 A. It -- it could be. That does not include what I owe in
13 inventory. You know, I might owe \$375,000 of that money in
14 inventory to Sun Trust Bank.

15 Q. All right. But you had a chance to list your liabilities
16 and your assets, all right, on this form. You have liabilities
17 and your assets. And under your -- your assets, you list net
18 worth of business.

19 A. Pontiac --

20 Q. No, above that.

21 A. Oh.

22 Q. Net worth of business owned, attach financial statements.

23 Am I reading the number correctly or incorrectly?

24 A. I don't know.

25 Q. Well, read the number for us.

1 A. I see that number but I don't know what it represents.

2 Q. Well, what is the number?

3 A. It says four hundred thousand.

4 Q. All right. More than four hundred thousand, correct?

5 A. The bottom line, sub-liquid access, sub-liquid, four hundred
6 twenty-five thousand. Sub-liquid.

7 Q. I would like you to go down one, two, three boxes --

8 A. Okay.

9 Q. -- to where it says net worth of business.

10 A. Net worth of business owned, attach financial statement.

11 Q. What's the dollar figure there?

12 A. \$436,115.32.

13 Q. When you filled out your financial statement, you filled out
14 this form?

15 A. Is that a personal financial statement or what?

16 Q. This is the one you did for the probation office, correct?

17 A. Okay.

18 Q. Also did a probation form 48D, Declaration of Defendant or
19 Offender, Net Worth and Cash Flow Statements. You filled that
20 out and signed it, correct?

21 A. Correct.

22 Q. And you signed that in May of 2013.

23 A. Ah, correct.

24 Q. And you understood you were required to tell the truth on
25 the financial statement, correct?

1 A. Ah, yes.

2 Q. All right. And is this the financial statement you filled
3 out?

4 A. This financial statement does not have the business side of
5 it. The business side -- if I had the numbers here that showed
6 how much I owed and how much was on accounts receivable, and if I
7 was an accountant, I could probably help you. I don't know.

8 Q. Well, let me help you, sir. Let me help you.

9 A. Thank you.

10 Q. I would like to refer you to the page where you list
11 liabilities. It says, other debts, you list your inventory owed,
12 correct?

13 A. \$229,612, that's correct.

14 Q. What are you looking at? I'm sorry.

15 A. Oh, \$142,113, right there.

16 Q. All right. So you listed the liability. Where is the asset
17 side?

18 A. What number are you trying to get to here?

19 Q. I'm asking you, on your form, where did you disclose the
20 value of the business?

21 A. Ah --

22 Q. It has a value, doesn't it?

23 A. It's only worth what I owe the bank, \$142,000. If I renig
24 on this loan, you know how much my inventory is worth on the
25 dollar? Do you?

1 Q. No, I'm asking you --

2 A. Well, I'm going to tell you. My inventory is worth 25 cents
3 on the dollar if I close my doors right now. And if you think
4 I'm lying, call NAPA in Detroit and ask them. I have no value --
5 it might be \$425,000. It might be a million dollars. It's only
6 what people will give the money for it. I don't know what you're
7 looking for. I don't understand your answer. I'm not an
8 accountant.

9 Q. I'm -- I know you're not an accountant but when you filled
10 out your mortgage application, did you take your accountant with
11 you?

12 A. No.

13 Q. All right. So when you filled out the mortgage application,
14 you were able to assess a value of \$436,000 to your business.
15 Where is anything like that reflected in your financial
16 statement, sir? Take a look at it.

17 A. Maybe it's at the bank. Maybe I told them at the bank my
18 business is worth half a million so I can get my percentage down
19 to three percent that I have to pay it back. It's all about
20 borrowing money. It's not -- that value is not a -- it's only
21 worth the person who wants to buy my property.

22 If you want to give me \$400,000, Janet, for my business,
23 I will sell it to you. But I will tell you what, it's only worth
24 \$142,000. If I go to that bank and tell that bank that that
25 business is worth \$600,000, I believe it is because somewhere

1 down the line, that bank is going to be -- that business will be
2 worth \$600,000. I believe that. I'm a hard worker. I make
3 money.

4 Q. All right.

5 A. But I can prove that as of right now, if Sun Trust would
6 come and get my store tomorrow, they are going to take my keys,
7 they are going to take my inventory and they are going to sell it
8 and if they get \$80,000 for it, they're going to say, Gary, you
9 owe me \$60,000 on a personal guarantee.

10 Q. Do you own a franchise?

11 A. No.

12 Q. Does your business have good will?

13 A. I don't understand the question. What is good will?

14 Q. Isn't that what you were trying to protect when you were
15 intimidating witnesses, the reputation of your good business?

16 A. I don't think I ever intimidated anybody in my entire life.

17 Q. When you -- did you think if somebody could say something,
18 that would harm your business?

19 MR. JACOBS: Objection, your Honor.

20 THE WITNESS: I don't understand the question.

21 MR. JACOBS: Relevance.

22 THE COURT: Overruled.

23 THE WITNESS: I don't understand the question.

24 BY MS. PARKER:

25 Q. All right. Let me go back through this. Would you take

1 \$129,000 for your business today?

2 A. Yeah.

3 Q. And walk away.

4 A. Yes, I would.

5 Q. Would you sign it over to the government then and we will
6 sell it for that.

7 A. If I'm clear of everything I owe, you betcha. If you want
8 my business, you can have it. But don't come back and get
9 nothing personally out of me. If that's what you want, I will
10 sign it over tomorrow. That means you owe Sun Trust Bank
11 \$142,000. That's part of the deal, pay all debts off,
12 everything.

13 THE COURT: Let's go back to questions and answers
14 specifically related to these issues.

15 BY MS. PARKER:

16 Q. Yeah. I'm going to ask you again, if you listed the
17 liability of the business, where did you list the value of the
18 business?

19 A. I don't know, Janet. I don't know. I can't answer that
20 question. I'm sorry.

21 Q. Do you agree with me that you did not?

22 A. I'm not answering that question. I'm sorry.

23 MS. PARKER: If the Court would like to review it, I
24 will offer it to the Court. Otherwise, I'm returning the two
25 documents.

1 THE COURT: Any redirect?

2 MR. JACOBS: Just -- yes, your Honor.

3 REDIRECT EXAMINATION

4 BY MR. JACOBS:

5 Q. Mr. Wilson, your pre-sentence report lists business, Rogers
6 City, Michigan, and your address on 3rd Street and on the far
7 right, it says sixty thousand.

8 Was that the value of the business?

9 A. What year is that, Steve?

10 Q. No, this is your pre-sentence report.

11 A. I guess. I guess.

12 Q. Okay. Where did you come up with that guess?

13 A. I -- read it to me again.

14 Q. It says -- you're listing assets. For business, it says
15 \$60,000.

16 A. That's the building. The building.

17 MS. PARKER: Your Honor, I think that's directed as the
18 real estate.

19 MR. JACOBS: That's what I'm asking.

20 THE WITNESS: Real estate. Real estate.

21 MS. PARKER: That's not the business. There are
22 distinguishable assets.

23 MR. JACOBS: That's what I was asking the client.

24 THE COURT: And I'm going to sustain the objection.

25 There are two identified assets, one is the business and one is

1 the property itself.

2 MR. JACOBS: I'm done.

3 MR. PIAZZA: If I may have a brief moment, your Honor.

4 (Whereupon defense counsel confer off the record)

5 MR. JACOBS: One more question, your Honor?

6 THE COURT: Sure.

7 BY MR. JACOBS:

8 Q. Your net worth statement lists GW & SW, Inc. -- business --

9 MR. BURNS: Mr. Jacobs, those are her documents.

10 BY MR. JACOBS:

11 Q. Oh. Your spouse's net worth statement lists GW & SW, Inc.,
12 Rogers City, Michigan, and the list appears to be \$100,000
13 estimate. Are you aware of that?

14 A. No.

15 MS. PARKER: Your Honor, again --

16 THE WITNESS: I don't know. I don't know.

17 MS. PARKER: If the document wants to be given to the
18 Court, fine, but this isn't testimony.

19 BY MR. JACOBS:

20 Q. Approach the witness, your Honor, and I will let him testify
21 as to what he gave the probation officer.

22 Look at this. What did you tell the probation officer
23 your business was worth?

24 A. \$100,000.

25 Q. All right.

1 MS. PARKER: I would like to ask that the actual
2 question be read.

3 BY MR. JACOBS:

4 Q. What did you tell the probation officer --

5 MS. PARKER: No, no.

6 Q. -- your GW & SW stock was worth?

7 MS. PARKER: Yes.

8 MR. JACOBS: There.

9 THE WITNESS: \$100,000.

10 MR. JACOBS: I have nothing further on this by the
11 witness, your Honor.

12 THE COURT: To clarify, if I could get a copy of the
13 2009 mortgage application. I'm aware of the fact that in 2009,
14 the mortgage application reflected --

15 MS. PARKER: I have a shrunk-down copy that's eight and
16 a half by eleven. This is a full-sized copy.

17 THE COURT: Thank you. I'm not quickly identifying the
18 location of the --

19 MS. PARKER: Page 3 on the left-hand side, three
20 quarters of the way down. It's the handwritten application.

21 THE COURT: I'm sorry but I'm not identifying it.

22 MS. PARKER: I'm sorry. Well, let me give you the copy
23 that I have. Here, do you want to --

24 MR. JACOBS: Yeah, you can give that to the Court.

25 THE COURT: And I'm sorry, Miss Parker, but even with

1 this document, I'm not reflecting an assigned value to the
2 business in the amount of four hundred twenty-three thousand.

3 MS. PARKER: It's \$436,115.32. Net worth of business
4 owned, attach financial statement.

5 THE COURT: Okay. Okay. Mr. Wilson, do you know how
6 that figure -- it's an unusual figure. It's \$436,115.32.

7 THE WITNESS: Don't quote me but I may have -- when I
8 went to get that loan, I may have went to my accountant and asked
9 him to put me something together to go to the bank and get a
10 loan. But I'm not sure. But I know I do not have that type of
11 knowledge to get you those numbers.

12 THE COURT: You separately identified, quote, real
13 estate owned within that category of \$310,000. Do you know where
14 that figure came from?

15 THE WITNESS: It could be my house. It could be the
16 cabin. It could be the building that the business sets in.

17 THE COURT: So you would actually be separating out any
18 valuable -- value assignable to the real estate. And the
19 \$436,000 would be in addition.

20 THE WITNESS: I believe so.

21 THE COURT: Okay. Counsel, any questions that may have
22 been occasioned by the Court's --

23 MR. JACOBS: I will try not to lead. I've been accused
24 of that today. I don't know why, your Honor.

25 THE COURT: On multiple occasions.

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1 MR. JACOBS: Yes.

2 REDIRECT EXAMINATION

3 BY MR. JACOBS:

4 Q. Do you utilize any documents from your accountant when you
5 do the loan application?

6 A. Yes.

7 Q. And what sort of documents does he give you?

8 A. I don't really look at them. I just pick up the pamphlet,
9 take it with me, give it to the bank and it has everything in
10 there that I need to get a loan at a certain percentage rate.

11 And I don't -- I don't know how that net worth is figured.

12 I -- I -- I don't know.

13 Q. All right. But to get to a number of four hundred thousand
14 and some odd cents, you took that from another document, is that
15 fair to say?

16 A. Yes, that's a copy.

17 MR. JACOBS: Nothing further, your Honor.

18 THE COURT: Any questions -- concluding questions, Miss
19 Parker?

20 RECROSS-EXAMINATION

21 BY MS. PARKER:

22 Q. Did you ask your accountant for a net worth of the business
23 when you prepared your financial statement to the probation
24 officer?

25 A. He helped us on some of it. But I'm not sure what parts.

1 Q. Do you know whether you got a financial statement regarding
2 the net worth of the business so you could fill out your
3 financial statement?

4 A. It was copied from something. I would had to have gotten
5 something from somewhere.

6 Q. What --

7 A. I don't have the knowledge to give you those numbers.

8 Q. To the probation office?

9 A. I would have given them to Marvin, yes. That would have
10 been copied from another form onto Marvin's form so that he would
11 have that, yes. Where those numbers come from, I cannot tell
12 you. I don't know how.

13 Q. I'm not asking where they came from. I'm asking, did you go
14 back and get a new statement regarding the value of the business
15 and put it on your probation form?

16 A. I'm not a hundred percent sure but I think I did. I would
17 have had to. I -- I don't know.

18 MS. PARKER: Your Honor --

19 THE WITNESS: I'm not a hundred percent sure.

20 MS. PARKER: I would submit that the Court can examine
21 the form and if you can find it, more power to you.

22 THE COURT: You're excused. Thank you.

23 THE WITNESS: Thank you.

24 (At 1:50 p.m. - witness excused)

25 THE COURT: I think we have the additional evidence

1 related to the issues. I guess I would ask very briefly, Mr.
2 Jacobs, we've worked our way through the testimony concerning the
3 disclosure of the \$750 per month, the fact that the principal
4 balances on those IRAs were not disclosed. We've worked our way
5 through the testimony concerning the assigned values to the
6 business.

7 I don't find any of the valuation questions of a
8 particular concern. It's simply those two issues.

9 MR. JACOBS: Yes, sir.

10 Sir, I would understand that it was a good faith mistake
11 in putting down the X amount of money per month, giving a certain
12 date, that the parties were actually aware of the IRAs and
13 just -- and actually listed the information to the Probation
14 Department and didn't put it in the correct column. And didn't
15 put it in the correct form. But they disclosed the information.
16 They are not trying to hide assets in this situation and that's
17 really what the Court has to find that we're hiding assets and
18 trying to somehow mislead the Court.

19 Secondly, as to this loan application, your Honor, I
20 hope I'm never held subject to the rigors of a loan application
21 that I did five years ago today because of, people puff. People
22 lie on loan applications when they are refinancing their house
23 and they say their assets are greater than what they really are.

24 In fact -- well, maybe this Court hasn't but most people
25 sit there and have the loan officer do it for you and you just

1 sign. And to say, oh, the pre-sentence report is so much
2 different than the loan application, well, first of all, that
3 loan application was five years ago and it is just that, a loan
4 application.

5 Lastly, I think we did explain the income received from
6 Northwestern and Mutual and again, just a mistake listing on a
7 loan application saying cash surrender value of four hundred
8 thousand. Nowhere did they say there were \$400,000 in
9 investments. Well, they did list life insurance at \$400,000 but
10 it was term insurance.

11 I don't -- I believe in this situation, the Court cannot
12 find that my clients -- my client purposely failed to disclose
13 any financial information in any attempt to defraud the Court in
14 this matter.

15 That's all, your Honor.

16 MR. PIAZZA: I would incorporate the arguments. You
17 know, one line the Court does find that they listed the asset of
18 income coming in as retirement which would lead to, you know --
19 and lists the stock, you know. It is there if you really look
20 for it.

21 There is nothing, you know, intentional on the part of
22 my client. And as far as the rest, you know, how much something
23 was worth five years ago as to what it is worth today, the Court
24 knows the values of businesses in various counties and various
25 small towns, how they, you know, can drastically fall overnight.

1 So there is nothing here for an intentional act because
2 my -- you know, we indicated in my brief, you know, we supplied
3 the documents to the Probation Department, you know. Assets go
4 up and down throughout the years. They did the best they can.

5 Thank you.

6 THE COURT: The government?

7 MS. PARKER: Your Honor, I think at the very best, what
8 you can say for Gary Wilson is, he acknowledged he was willing to
9 puff or whatever -- I believe that was the term he used -- to get
10 the interest rate he wanted on a mortgage. Why would one think
11 that he wasn't willing to hide his assets all of a sudden when
12 it's in his interest to do that, too? There is no reason to
13 think that he would only lie to a bank and not lie to a probation
14 officer. There is no basis for that.

15 I don't think we need to get lost in the minutia here.
16 I think the big issues are what need to be kept in mind, that if
17 you look at the financial statements in the pre-sentence report,
18 it doesn't list the second house. It lists it as real estate.
19 Look at the mortgage application. It lists a mortgage-free
20 residence worth \$172,000.

21 The value of the business, it's not reflected. The
22 stock is listed as \$100,000. And the inventory indebtedness is
23 listed as a greater amount, offsetting it and -- and more than
24 offsetting it. There is nothing ascribed to the value of the
25 business in the report.

1 The Court has already addressed, I believe, the 401(k).
2 It's -- it's too convenient to say, well, we put it somewhere
3 else. We didn't understand. They listed the small IRA in the
4 correct place, did not list the much larger assets of that nature
5 in the same place.

6 But I think it's also important to look at their
7 financial statements and see how they've voluntarily reduced and
8 artificially reduced their income to try to give rise to a
9 negative cash flow. Sue outright -- Sue Wilson quits. Gary
10 Wilson now reports his monthly income is less than it was every
11 year for which we have tax returns.

12 They -- again, they modify things, lower the amounts.
13 I'm not worried about the cash value of the life insurance --
14 term life insurance and stuff like that but what I think when you
15 look at these various things and then you see that even with all
16 this understatement and withholding of information, they have
17 \$300,000 in assets, it doesn't make any sense. I mean, that's
18 what's in their pre-sentence reports. \$300,000 in assets without
19 even listing all their assets. And yet they purport to be living
20 a negative cash flow and I think the whole purpose of that is to
21 lead the probation officer to the conclusion that they shouldn't
22 be required to pay a fine and restitution.

23 They have enough liquid assets to pay -- or enough
24 assets, not necessarily liquid, excuse me -- but enough assets to
25 pay restitution in full and still pay towards the fine. If you

1 liquidated everything they had, I'm not asking the Court to do
2 that, but I'm asking the Court to look at what they did and how
3 it all aligns with their interests in trying to avoid having a
4 financial penalty that would require them to eat into some of
5 those assets.

6 THE COURT: The question that we have in applying this
7 last guideline variable was whether or not the information, the
8 financial information that was disclosed was accurately
9 furnished.

10 We have a good explanation concerning the earlier
11 disposition of the Northwest Mutual Life and Hartford Life
12 Insurance Company. Those were whole life policies that were
13 cashed in order to make sure that they were able to make a
14 contribution to their kids' college.

15 I also am accepting of the idea that it was just sheer
16 naivete when they disclosed to the bank in 2009 that they had
17 life insurance benefits with a cash surrender value of four
18 hundred thousand. It was just a mistake. And besides that, it
19 isn't a representation that was made to the Court. It was a
20 representation that was made to the bank. Just a mistake. Naive
21 mistake.

22 I'm not quite so convinced with respect to the omission
23 of the two IRA accounts which are later disclosed, the one in Sue
24 Wilson's name for \$35,874 in September of 2013 and \$49,415.44.
25 I'm not satisfied that the disclosure of the calculation

1 reflecting a monthly payment amount, which I initially
2 interpreted as a defined benefit calculation, is in any way fair.
3 The documentation they were furnished was very clear. It refers
4 to IRAs. They got it right with respect to a small one. They
5 got it wrong with respect to two major ones with an economic
6 value of over \$80,000.

7 You only get there -- you only get to a way of imputing
8 or calculating a monthly benefit by selecting a possible
9 retirement date and then asking someone to do a calculation.
10 Now, if the point here was to determine what their possible
11 retirement benefit might be, that calculation makes all the sense
12 in the world.

13 On the other hand, everyone with an IRA or 401(k) is
14 quite aware, that the invested portion of that 401(k) is the
15 assigned economic value. That's what comes on the reporting
16 sheets monthly or quarterly or semi-annually and it's the figure
17 that they identified with the smaller account and not the larger
18 account.

19 Last question is -- and I would respectfully conclude
20 that that was a misstatement, that I don't think was in error.
21 It was a clear misrepresentation of the circumstances in my
22 view.

23 Similarly, they have assigned \$100,000 to the GW & SW
24 Incorporated, a separate assigned value of \$60,000 to the land
25 itself. So giving them the benefit of the doubt, they've

1 disclosed a market value of \$160,000 for the land and the
2 business, net of an obligation to the bank of a hundred forty-two
3 thousand and change. So roughly net of the debt of about
4 \$22,000.

5 I accept Mr. Wilson's point which is the market value of
6 the inventory, in a liquidation circumstance, would be very low
7 but we've got to compare that, on the other hand, with as early
8 as 2009, well past the financial meltdown at that point, he was
9 representing to the bank that the market value of the business
10 inclusive of inventory, was \$423,000.

11 It doesn't go from \$423,000 in 2009 to \$22,000 in 2013,
12 without some reasonable explanation other than, trying to hide a
13 value from the probation officer who was trying to make a
14 decision concerning restitution and the propriety of a fine. And
15 that's the conclusion that I reach from the evidence that we've
16 received.

17 Now, the only other challenges were to the Pochmaras'
18 financials. They were more modest in scope. It is of no
19 particular moment to the Court that they used the proceeds from
20 the sale of their GW & SW stock, to be applied against their
21 residential mortgage. And of no particular moment that they had
22 advanced a significant amount of additional funds beyond the
23 required monthly payment for a period of time before that.

24 Is that at all significant to the government?

25 MS. PARKER: I'm sorry, your Honor. I didn't hear the

1 question. I was looking for my Pochmara materials. I'm sorry.

2 THE COURT: One -- one of the -- in your commentary in
3 your supplemental papers, you refer to the fact that
4 approximately \$80,000 of the G.W.S.W. stock sale proceeds were
5 applied against the mortgage plus a certain amount of money that
6 was advanced monthly for a period of time that was greater than
7 the monthly payment.

8 Does it matter?

9 MS. PARKER: No.

10 THE COURT: Okay. I agree.

11 MS. PARKER: I was just trying to analyze what was
12 given.

13 THE COURT: The only remaining question that I've got is
14 as to the disposition of the John Hancock and Northeastern
15 Michigan Community Mental Health Services. We reflect that in
16 the approximate range of thirty-two thousand. My -- the figures
17 reflect that as being -- that account as having a value of
18 fifty-two thousand. There is a \$22,000 spread there where there
19 is no explanation and that would all have been relatively
20 recently.

21 MS. PARKER: I think there is two different numbers.
22 One was the value, as I recall -- and maybe I'm butting in and
23 you weren't directing your attention to me -- but as I understand
24 the documents, the value of what was in that Northeastern
25 Community account was fifty-four thousand and it was the

1 thirty-two thousand that was used to offset the fraud resulting
2 from the misrepresentation as to the marital status.

3 THE COURT: We're on the same page.

4 MS. PARKER: All right.

5 THE COURT: So that's just the remaining question that I
6 would have concerning the Pochmaras' materials.

7 MR. RUPP: Judge, with regard to the difference of the
8 \$22,000, I have spoken with Maxine and she has provided, to my
9 knowledge, the documentation in her possession or that she was
10 able to get a hold of.

11 The explanation I offered in my original sentencing
12 memorandum is that the remainder that wasn't eaten up by taxes
13 and penalties for early disbursement was used to pay towards debt
14 on a truck and a camper, debt that they are still paying on after
15 the camper was repossessed, as well as additional medical bills,
16 primarily, I think, for Robert's benefit but Maxine had also gone
17 through, I believe, a knee replacement.

18 THE COURT: Whose vehicle?

19 MR. RUPP: I believe it was a joint vehicle. As I
20 understand it, the truck and the camper were repossessed by the
21 credit union at the same time. They were able to pay off most if
22 not all of the debt on the truck. There is remaining deficiency
23 on the camper.

24 After repossession, the bank sold it for approximately
25 half of its value and we provided the letter with my original

1 sentencing memorandum, at least -- excuse me, at least that they
2 received from the credit union indicating that they still owed
3 that money.

4 THE COURT: And any proofs you wish to offer on the
5 point?

6 MR. RUPP: I don't have anything additional beyond what
7 I've submitted, your Honor.

8 THE COURT: Any arguments on the point from the
9 government?

10 MS. PARKER: Yes, your Honor. There is very little
11 documentation. The documentation regarding the payment on the
12 camper shows a total of six hundred payments -- \$600 in payments.
13 That's it. If you look at -- they've made the first of the
14 payments at the time of their conviction and the most recent one,
15 they surrendered their interest in it in the camper in October
16 based on what's attached to Mr. Rupp's pleadings. I believe it's
17 Attachment B. And then they apparently surrendered it in
18 October.

19 They don't make any payments until after they are
20 convicted and it's a grand total of \$600 on that. There is no
21 documentation regarding the camper or -- excuse me -- the truck,
22 or the medical expenses. So I don't think that answers the
23 question of where did the twenty-two thousand plus or minus go.

24 MR. RUPP: I think the limited payments on the camper
25 further demonstrate the fact that they don't have this money.

1 They are tapped out. She is doing the best she can to pay her
2 debts. She lost her job through Community Mental Health as a
3 result of the -- the fraudulent use of her insurance benefits and
4 she hasn't rested on her laurels while this case has been
5 pending. She has gone out and found other employment.

6 THE COURT: And I -- I appreciate your point. The
7 issue, frankly, was simply to corroborate the \$22,000. I'm
8 satisfied at this juncture in examining the circumstance that
9 there was not an effort on her part to obstruct justice. You've
10 offered a plausible explanation.

11 I think Miss Parker's point, which is that it would be
12 quite easy to corroborate the use of the \$22,000 with some sort
13 of documentary evidence which she didn't do. But try to obstruct
14 justice? I can't reach that conclusion in quite the same way
15 that I have with respect to the information received from the
16 Wilsons. So I would not score 3C1.1 with respect to the
17 Pochmaras.

18 Now, that reaches conclusions on all of what I've
19 referred to as the common guideline questions that remained at
20 issue. We don't have time to complete the sentencing hearing
21 today.

22 We will continue on January the 27th of 2014, nine a.m.,
23 unless we have any particular challenges.

24 MR. PIAZZA: I'm sorry, your Honor, what time?

25 THE COURT: Nine a.m. If defense counsel have any

1 particular concerns, or Miss Parker, concerning the availability
2 of the date, I would greatly appreciate if you would take that up
3 with our case manager and we will proceed on that date.

4 MS. PARKER: Could we have just a moment, your Honor?
5 May I confer with counsel?

6 THE COURT: Yes.

7 (Whereupon counsel confer off the record)

8 MR. PIAZZA: Thank you, your Honor.

9 MS. PARKER: Thank you, your Honor. Nothing further.

10 MR. KOELZER: Thank you, your Honor.

11 THE COURT: Record is closed. Thank you.

12 (At 2:11 p.m. - proceedings adjourned)

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CERTIFICATE OF COURT REPORTER

I, PEG L. GOODRICH, Official Court Reporter
in and for the United States District Court, Eastern
District of Michigan, appointed pursuant to the
provisions of Title 28, United States Code, Section
753, do hereby certify that the foregoing proceedings
held before the HONORABLE THOMAS L. LUDINGTON, District
Court Judge, is a true and correct transcript of my
stenotype notes in the matter of UNITED STATES OF AMERICA
v ROBERT POCHMARA, MAXINE POCHMARA, GARY WILSON and SUE
WILSON, File No. 12-20607, held on Monday, December 9, 2013.

s/Peg L. Goodrich
Peg L. Goodrich, CSR, RPR, RMR
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: February 26, 2013
Bay City, Michigan